(1)

93-27

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOGANANDA HAZRA - PETITIONER

vs.

NATIONAL RX SERVICES, INC. - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the appeals' court abuse its discretion in considering petitioner's pro se appeal on Rule 60(b)(3) and (b)(6) motion to vacate the summary judgment because the motion was supported with an affidavit which provided evidence of fraud by attorneys and proof of fraud about facts by judges and in the Pro Se Appellant's Brief showing conspiracy to violate appellant's Constitutional Rights to equal protection and equal privileges under the law because of petitioner's race and national origin ?

2. Did the appeals' court abuse its discretion in imposing sanction against the petitioner because the imposition of sanction by the district court was an abuse of discretion of the F.R.C.P. Rule 11 violation determination according to the standard of review set forth by this Court in 1990 since in an earlier case this Court ruled that the district court may entertain a Rule 60(b) motion without leave by the appellate court and the petitioner in support of the Rule 60(b)(3) and (b)(6) motion in an affidavit provided evidence of fraud by attorneys and proof of fraud about facts by judges ?

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Petitioner, Jogananda Hazra, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit affirming the district court's abuse of discretion in considering petitioner's Rule 60(b)(3) and (b)(6) motion to vacate the summary judgment obtained by respondent's counsel and its Labor and Associate Counsel by perpetrating fraud, that is, attorneys fraud and judges fraud about facts of the case and also abuse of discretion in affirming the district court's imposition of sanction and award of attorney fees on appeal and denial of petitioner's Petition for Rehearing involving petitioner's civil rights violation and conspiracy to violate petitioner's U.S. Constitutional Rights to equal protection and equal privileges under the law because of petitioner's race and national origin and also for fraud and dirty tricks.

OPINIONS BELOW

The Order of the Court of Appeals affirming the district court's denial of petitioner's Rule 60(b)(3) and (b)(6) motion and imposing sanction and awarding attorney fees on appeal appears in Appendix A to this Petition. The Order of the Court of Appeals denying Petition for Rehearing appears in Appendix B to this Petition. The Order of the district court about petitioner's Rule 60(b)(3) and (b)(6) motion to vacate summary judgment appears in Appendix C to this Petition.

JURISDICTION

The Court of Appeals' Order regarding this matter was filed on January 25, 1993. A timely Petition for Rehearing was filed on February 3, 1993. The Court of Appeals' denial of the Petition for Rehearing was issued on February 23, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Civil Rights act under Title 42, U.S.C. Section 2000e-5(f)(1) for an unlawful employment discrimination based upon race and national origin and Federal Age Discrimination in Employment Act, Title 29, U.S.C. Section 621 et seq. .

2. United States Constitution Title 42, U.S.C. Sections 1985(3) and 1986:

(a) Section 1985(3) of the United States Constitution in relevant part provides: If two or more persons in any State or Territory conspire, ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(b) Section 1986 of the United States Constitution in relevant part provides: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, ...

STATEMENT OF THE CASE

The United States District Court, Southern District of Ohio, Eastern Division, had jurisdiction pursuant to Title 42, U.S.C. Section 2000e-5(f)(1) and Title 29, U.S.C. Section 621 et seq..

1. Petitioner was done wrong by petitioner's former employer by and through its agents and petitioner's civil rights was violated. Accordingly, on time, petitioner filed a complaint with the Ohio Civil Rights Commission (OCRC) in writing with supporting documents for investigation and, also requesting the OCRC to send the complaint to the Federal Equal Employment Opportunity Commission because petitioner wanted the complaint handled by the Federal Equal Employment Opportunity Commission. The OCRC did not do a good job of investigation because as soon as petitioner received notification of the OCRC decision, petitioner wrote a letter to the OCRC asking, among other things, how did the OCRC agent determined that the management of petitioner's former employer told them truth ? Petitioner questioned the OCRC in that manner because petitioner presented to the OCRC direct proof that the management of petitioner's former employer has a habit of lying and has perjured to the U.S. Senate Hearing Committee. But the OCRC instead of answering petitioner's questions deliberately misrepresented facts in its answer. So, petitioner wrote to the Federal Equal Employment Opportunity Commission to get answers to petitioner's questions from the OCRC and also to investigate. After sometime the Federal Equal Employment Opportunity commission mailed its determination and in it did not answer the questions petitioner posed to the OCRC but gave petitioner permission to sue petitioner's former employer.

2. Petitioner, then, within the time allowed by the Federal Equal Employment Opportunity Commission, pro se, filed a complaint giving in detail both front end and back end of the events in the U.S. District Court. In short, petitioner was born in India on May 30, 1935, and of the Asian race and came to this country as a student to study pharmacy in 1960 and in 1963 earned a B. Sc. degree majoring in pharmacy from a College of Pharmacy in Philadelphia, PA. Since in those days Pennsylvania

law required that for an individual to obtain a license to practice as a pharmacist an individual, among other things, not only should have a B. Sc. or equivalent degree in pharmacy but also be a citizen of U.S. and PA. And since petitioner was not a citizen of U.S. then, still on student visa, so did not receive a license to practice pharmacy. But petitioner went on for higher education and after finishing higher education went on to research involving neurocommunication and integration in an expression of organismic behavior, that is, Neurosciences. In due time petitioner also became a U.S. citizen. In 1983 petitioner was unemployed and one day petitioner came upon a newspaper advertisement for a junior pharmacist position, which required a degree in pharmacy only, no license required, from National Pharmacy, Elmwood Park, New Jersey. Petitioner responded to the advertisement and was offered a junior pharmacist position and petitioner started working from April 1983. At that time National Pharmacy was under the umbrella of a separate corporation. But latter in 1983 that corporation sold National Pharmacy to a different corporation and this new corporation was expanding and opening a new plant at Columbus, Ohio, in 1984, so were looking for workers to transfer to Columbus, Ohio. And in February 1984 petitioner transferred to respondent's plant at Columbus, Ohio. Before transferring to Columbus, petitioner inquired with the Ohio State Board of Pharmacy as to how petitioner can obtain a license to practice pharmacy and explained to the Board of Pharmacy that petitioner has earned pharmacy degree and a citizen of U.S. . Ohio State Board of Pharmacy explained that all petitioner has to do is register with the Ohio State Board of Pharmacy as an intern and to finish the required number of internship hours at petitioner's own choice of place and then to take the Board administered pharmacy licensor examination and if petitioner pass the examination then the Board of Pharmacy would issue a Registered Pharmacist License. So, after transferring to Columbus plant, in Ohio, petitioner registered with the Ohio State Board of Pharmacy as an intern of the Ohio State Board of Pharmacy and started using the work hours at respondent's plant towards petitioner's internship hours. After finishing the required internship hours, in January 1985

petitioner took the Ohio State Board of Pharmacy administered pharmacy licensor examination and the Board of Pharmacy at the beginning of March of 1985 informed petitioner that petitioner passed the pharmacy licensor examination and issued a Registered Pharmacist License. Respondent after seeing petitioner's Registered Pharmacist License hired petitioner as a Registered Pharmacist on or about March 5, 1985. Sometime toward the latter part of 1985 respondent by and through its management team Jack Siddle, Donald Ivanoff and Steve Harris started initiating conditioning, that is, experimenting on petitioner to increase petitioner's prescription checking rate by telling petitioner to give in writing stating "I (petitioner) would improve my checking rate (i.e., prescription checking rate) within the next 30 days or else I should be terminated". Petitioner refused to give respondent's management team in writing but said petitioner would try to improve petitioner's prescription checking rate. Next day respondent again through one of its management team, Steve Harris, started the same thing and asked petitioner why petitioner would not give in writing what they wanted petitioner to do ? Petitioner answered petitioner is not sure that petitioner can improve prescription checking rate that much and also said that if petitioner make mistake then all of you are going to jump all over petitioner. Steve Harris then said that he (Steve Harris) has put some patient in hospital but the company has still made him Pharmacist Supervisor. Petitioner asked Steve Harris what happened ? Steve Harris answered that he sent Halcion for Halotestin and said don't worry about mistake just think of improving your checking rate if you want to keep your job. Since then petitioner improved petitioner's checking rate and kept up with the plant's productivity rate. About two years latter on June 30, 1987, respondent by and through its management team Jack Siddle and Steve Harris called petitioner to the front office area and showed petitioner a mistake. After inquiring petitioner found out that petitioner failed to catch the error which was there. Respondent's management team had a piece of paper with them and gave the paper to petitioner and asked petitioner to read the paper and to sign. The paper was titled Notice of Disciplinary

Action dated 6-30-87, and on it written, among other things, which meant petitioner should not make an error for 60 days. Petitioner read but refused to sign. Because, among other things, the error that petitioner failed to catch also belonged to the same therapeutic class and as such could not have adversely affected the safety or welfare of the patient, yet respondent's agents marked a box on this piece of paper which represented that the error adversely affected the safety or welfare of others. Respondent's agents became irritated when petitioner refused to sign. Jack Siddle wrote by hand on that paper "Present and Refused to Sign Jo Hazra" then both Jack Siddle and Steve Harris signed the paper and gave petitioner the original (See Exhibit 1 attached with Complaint). On July 27, 1987, petitioner was again called to the front office area and was shown an error. As before after inquiring petitioner found out that petitioner failed to catch the error that was there. As usual respondent's agents Jack Siddle and Steve Harris had with them a piece of paper which they signed and gave the original to petitioner. The paper was titled Notice of Disciplinary Action dated 7-27-87, and petitioner noted that respondent shifted the condition to 90 days on this second Notice of Disciplinary Action of 7-27-87 (See Exhibit 2 attached with Complaint). Petitioner was shocked to see that because respondent knew before hand that petitioner failed to catch an error within 30 days of the first Notice of Disciplinary Action and yet respondent by and through its agents shifted the condition to 90 days. On October 30, 1987, petitioner was called to the front office area and in the room there were respondent's agents Jack Siddle, Sam Bornhold and Steve Harris. Jack Siddle had a piece of paper with him and Jack read from the paper, which in essence said as of October 30, 1987, petitioner is terminated from employment from respondent's company (See Exhibit 3 attached with Complaint). However, about two to three days before that date of October 30, 1987, that is, termination date, petitioner was shown two errors which petitioner failed to catch. After Jack Siddle read that petitioner is terminated then all of them signed and Jack handed the original to petitioner and then Jack asked if petitioner has anything to say. Petitioner answered no, all of you

have decided so petitioner has to follow. Sam Bornhold then said that petitioner has a choice. Petitioner asked Sam what choice? Sam answered petitioner could resign. Petitioner then asked Sam what difference it makes ? Sam answered if petitioner resign then they will remove those papers from petitioner's file and when someone would contact them they will tell that petitioner did work for respondent but resigned effective October 30, 1987. Sam also added that petitioner do not have to give any reason as to why petitioner is resigning, but just say that petitioner is resigning as of Friday, October 30, 1987, and to bring the resignation letter to his office on Monday, November 2nd. Petitioner did not give respondent or any of its agents any resignation letter (See Complaint of Amended Complaint).

3. Respondent through its counsel submitted answer and in it denied, among other things, that respondent by and through its agents experimented on petitioner with threat of termination to increase petitioner's prescription checking rate and that on the date of termination attempted to blackmail petitioner and sent a copy to petitioner (See Answer of Defendant National Rx Services, Inc.). Respondent's counsel also notified petitioner about taking deposition from petitioner. Petitioner informed respondent's counsel date(s), time and conditions about deposition. Petitioner, then, submitted interrogatories specifying that the following interrogatories be answered under oath by your officers in your behalf who know the facts first-hand about which inquiry is made and sent the interrogatories to respondent's counsel. Just before taking deposition from petitioner respondent's counsel sent a stipulation asking petitioner's permission for protective order about petitioner's deposition materials. Petitioner rejected respondent's counsel idea of protective order. So, after taking deposition from petitioner respondent's counsel filed papers with the district court for protective order about deposition materials. Petitioner filed with the court papers opposing granting protective order against petitioner's deposition materials. In the meantime respondent's counsel in concert with respondent perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests"

by denying facts which transpired between petitioner and respondent's agents and also perpetrated dirty tricks on petitioner by not identifying under oath who is answering petitioner's interrogatories. So, petitioner filed with the district court "Motion to Compel Answer to Interrogatories by Plaintiff" and submitted to the court what petitioner presented to respondent's counsel and what petitioner got in response from respondent's counsel.

4. A magistrate from the court notified for a pretrial conference. During the conference the magistrate granted respondent's protective order against petitioner's deposition materials in spite of petitioner's objection. And the magistrate told petitioner that since respondent's counsel has sent petitioner the verification page after petitioner filed motion to compel answer so the motion is moot. Finally, the magistrate said that everything would be stipulated and petitioner should agree and the conference ended. When petitioner received the magistrate's written report about the conference from the court and a stipulation from respondent's counsel asking petitioner to sign, petitioner rejected counsel's stipulation because of paragraph 3 (See a copy of the failed "Stipulation" is attached as an Appendix to the Pro Se Apellant's Brief filed on August 28, 1992). Because, among other things, respondent's counsel wanted petitioner to sign saying that petitioner is hereby withdrawing petitioner's motion to compel. Finally, the magistrate issued an order granting respondent's protective order against petitioner's deposition materials (See Order of Oct. 5, 1989 and April 26, 1990).

5. Because respondent's counsel during the pretrial conference talked to the magistrate about summary judgment motion, so, after the pretrial conference petitioner started doing research to find out what summary judgment involves and what petitioner has to do. And petitioner came to know about Rule 56 of the F.R.C.P. and this Court's rulings about summary judgment motion in 1986 in two cases (1) Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) and (2) Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) which gave petitioner guidance as to how to respond to summary judgment motion and what

judges should not do. Also, petitioner came upon this Court's ruling in which this Court referring to its previous rulings involving "mixed-motives" set guidelines for civil rights violation determined in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989).

6. However, because petitioner knew respondent's counsel and its Labor and Associate Counsel perpetrated fraud in answer to petitioner's interrogatories, so, petitioner started inquiring with the line pharmacists of petitioner's former employer who worked with petitioner in the same plant where petitioner worked. Petitioner asked a few of the pharmacists, individually, were they ever asked to give in writing stating "I would improve my checking rate (i.e., prescription checking rate) within the next 30 days or else I should be terminated" ? From the answers petitioner found out that most of them were not asked to give in writing stating "I would improve my checking rate (i.e., prescription checking rate) within the next 30 days or else I should be terminated" and these were white pharmacists. Out of the few pharmacists that petitioner inquired, one said he was asked but not in the same manner. The one who was asked he said, he was asked to sign a piece of paper which had to do with improving his prescription checking rate and when he did not agree to sign , petitioner's former employer's agents made a deal with him saying that if he improved by about 10 per hour it will be all right. This individual pharmacist is also white. Petitioner then asked this individual pharmacist, was Jack Siddle present in the room when that happened ? This individual pharmacist answered, yes, Jack Siddle was present in the room. This Court may be wondering why petitioner asked if Jack Siddle was present in the room. Please allow petitioner to explain. In pharmacy business employer operates by receiving terminal distributor license through Registered Pharmacist's License, that is, Licensed Pharmacist's. And Jack Siddle was respondent's Chief Pharmacist at the plant where petitioner used to work as well as this individual pharmacist worked. So, petitioner got proof that respondent did not treat white pharmacists similarly as petitioner was treated, and also respondent's counsel and its Labor

and Associate Counsel perpetrated fraud in answer to petitioner's interrogatories in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests", and petitioner would have no difficulty in proving that they perpetrated fraud.

7. In the meantime, because respondent perpetrated fraud in answer to petitioner's interrogatories and destroyed discoverable evidence by and through respondent's counsel and its Labor and Associate Counsel and agents (See Affidavit pp. 1-8, attached in support of the Rule 60(b)(3) and (b)(6) motion filed January 31, 1992, in the district court) and then, respondent's counsel filed motion for summary judgment. Therefore, in opposition to respondent's motion for summary judgment in an affidavit petitioner disputed respondent's facts, as well as, because respondent's counsel in concert with respondent perpetrated fraud in answer to petitioner's interrogatories and destroyed discoverable evidence (See Affidavit pp. 1-8, cited above) and then filed motion for summary judgment, so, petitioner also reaffirmed the facts of the complaint and amended complaint in the affidavit to show that there is a genuine issue for trial as required by F.R.C.P. 56(e) (Please note this is also according to what this Court stated with respect to the summary judgment motion in Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986); note also it has been cited at p. 2 of the Brief in Support of the Motion to Vacate Judgment under Rule 60(b)(3) and (b)(6) filed January 31, 1992), and also to indicate to the district court what petitioner was going to prove (See Plaintiff's Motion to Deny Defendant's Motion for Summary Judgment and attached Affidavit).

8. Petitioner obtained from the Federal Equal Opportunity Commission (EEOC) what respondent's counsel submitted to EEOC. From the materials petitioner discovered that EEOC did not do any investigation of its own but made their recommendation from the materials what respondent's counsel sent to the Ohio Civil Rights Commission (OCRC). Note this Court has been informed that EEOC did not answer the questions petitioner posed to the OCRC but gave permission to sue petitioner's former employer (See above, Paragraph 1). And going over the

materials petitioner discovered that respondent's counsel perpetrated fraud just as they perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests". So, petitioner filed on June 6, 1990, "Plaintiff's Motion to Hold Defendant and Defense Counsel on Fraud and Fraud Upon the Court if the Defendant Fail to Meet Plaintiff's Challenge and to Allow Plaintiff to Add Another Count into the Amended Complaint Under Tort", and attached to the motion, as an example, a page from the materials that petitioner received from the EEOC which respondent's counsel submitted to the OCRC. From this page petitioner realized that respondent's counsel in response to the OCRC inquiry knowing that petitioner, among other things, claimed civil rights violation based on age and race, so, respondent's counsel made a pharmacist of the same race as that of petitioner's but in the age category of 30's to 61 years of age. Proof, see the attachment page that was submitted to the district court with the above titled motion and note Number 9 Staff Registered Pharmacist, that is, Tu, Ann-Sheng, listed as Asian race, that is same race as petitioner's, and 61 years of age. But after petitioner challenged as to the truth of the age of Number 9 Staff Registered Pharmacist being 61 years of age, respondent's counsel failed to prove that in April 1988 , when respondent's counsel sent that sheet of page to the OCRC , Number 9 Staff Registered Pharmacist was 61 years of age. On the contrary, in 1988 Number 9 Staff Registered Pharmacist was in the 30's because Number 9 Staff Registered Pharmacist's date of birth is March 9, 1951 (See Defendant's Memorandum Contra Plaintiff's Motion to Hold on Fraud p. 3). The petitioner attached with the above entitled motion this particular sheet of page because not only to prove that respondent's counsel perpetrated fraud but also to prove a prima facie case of age discrimination because pharmacist numbers 29 to 32 were hired after petitioner was terminated and all of them were under 40. Note this was indicated to the district court (See Brief in Support of the Motion to Vacate Judgment pp. 4-5, filed with the Rule 60(b)(3) and (b)(6) motion).

9. The district court judge, however, without a hearing or anything issued an order granting respondent's motion for

summary judgment (See Opinion and Order of September 5, 1990).

10. Within the allowed time petitioner then filed a motion under Rule 59(e) to vacate the judgment to alter. The judge from the district court in an Opinion and Order of February 12, 1991, affirmed his previous decision of granting respondent's motion for summary judgment (See Opinion and Order filed February 12, 1991).

11. Petitioner, then, within the allowed time, pro se, filed a Notice of Appeal and appealed the district court's decision to the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals send petitioner papers to file "Pro Se Appellant's Brief". Petitioner then filed a motion to the Sixth Circuit Court of Appeals to permit appeal on original records because there was no hearing or trial and the motion was granted. Petitioner filed, within the time allowed, "Pro Se Appellant's Brief" in the Sixth Circuit Court of Appeals (See Pro Se Appellant's Brief filed March 25, 1991). The Sixth Circuit Court of Appeals issued an Order on July 22, 1991, and in it affirmed the district court's judgment. Because the appeals' court judges, among other things, in their Order omitted to consider "mixed motive", so, within the allowed time, petitioner, pro se, filed a "Petition for Rehearing". On November 26, 1991, the appeals' court judges in an Order stated "finds no issue of law or fact that was overlooked or misapprehended." and reaffirmed the judgment of the district court (See App. D).

12. Since this Court ruled that the district court may entertain a Rule 60(b) motion without leave by the appellate court (See Standard Oil Co. of California v. United States, 429 U.S. 17, 97 S.Ct. 31 (1976); also see Wright & Miller, Federal Practice & Procedure: Civil Section 2873, Pocket Part, (1992)); and since judge Smith from the district court perpetrated fraud about facts in his Opinion and Order filed February 12, 1991 (Proof, see Brief in Support of the Motion to Vacate Judgment under Rule 60(b)(3) and (b)(6) p. 3 along with the attached Affidavit pp. 9-14, with special emphasis on pp. 13-14, paragraphs 10 and 11, which would show district court judge Smith's fraud about facts), and

judges Merritt, Keith and Celebrezze from the appellate court also perpetrated fraud about facts in their Order of November 26, 1991 (Proof, see Brief in Support of the Motion to Vacate Judgement under Rule 60(b)(3) and (b)(6) pp. 6-8 along with the attached Affidavit pp. 14-18, paragraphs 12 and 13, which would show fraud about facts of all the judges names therein). Therefore, pursuant to Rule 60(b)(3) and (b)(6) of the Federal Rules of Civil Procedure petitioner, pro se, filed a Motion to Vacate Judgment in the district court (See Motion to Vacate Judgment under Rule 60(b)(3) and (b)(6) with attached Brief in Support of the Motion to Vacate Judgment and Affidavit filed January 31, 1992).

13. The same judge from the district court in an Order of June 30, 1992, denied petitioner's Rule 60(b)(3) and (b)(6) motion and imposed sanction (See App. C).

14. Because judge Smith from the district court abused judge's discretion in considering petitioner's Rule 60(b)(3) and (b)(6) motion, therefore, on time, petitioner filed a Notice of Appeal and appealed the district court's decision to the Sixth Circuit Court of Appeals. The appeals' court send petitioner paper to file "Pro Se Appellant's Brief". As before, petitioner filed a motion to the appeals' court to permit appeal on original records because there was no hearing or trial and the motion was granted. Petitioner on time filed "Pro Se Appellant's Brief" and in the brief pointed out two counts of abuse of discretion by the district court; (1) abuse of discretion in considering petitioner's Rule 60(b)(3) and (b)(6) motion and (2) abuse of discretion in imposing Rule 11 sanction on petitioner (See Pro Se Appellant's Brief filed August 28, 1992).

15. Respondent filed Defendant-Appellee's Brief.

16. On January 25, 1993, the appeals' court issued an Order and affirmed the district court's decision and imposed sanction (See App. A). The appeals' court in its Order of January 25, 1993, omitted to consider the fact that judge Smith from the district court in his Order of June 30, 1992, misrepresented fact and stated "The Court entered its judgment on September 5, 1990. Therefore, his motion alleging fraud under Rule 60(b)(3) is un-

timely." (See App. C, under Law and Analysis). This is misrepresentation of fact because judge Smith perpetrated fraud about facts in his Opinion and Order of February 12, 1991, in response to petitioner's Rule 59(e) motion to vacate summary judgment. Note this was indicated in Pro Se Appellant's Brief filed August 28, 1992 (See Pro Se Appellant's Brief filed August 28, 1992, answer to question 2 for facts and answer to question 3 for law). Accordingly, petitioner on time filed a Petition for Rehearing and in it provided direct proof that the appeals' court omitted to consider the fact that judge Smith from the district court misrepresented fact in Smith's Order of June 30, 1992 (See Petition for Rehearing filed February 3, 1993).

17. On February 23, 1993, the appeals' court issued an Order and denied petitioner's Petition for Rehearing (See App. B).

REASONS FOR GRANTING THE PETITION

This case presents important questions about abuse of discretion in considering petitioner's appeal on Rule 60(b)(3) and (b)(6) motion to vacate summary judgment obtained by respondent's counsel because of attorneys and judges fraud and imposition of sanction. The appeals' court concluded that the district court did not abuse its discretion in denying petitioner's motion to vacate judgment filed pursuant to Rule 60(b)(3) and (b)(6) and imposing sanction according to Rule 11 of the F.R.C.P., and accordingly, held frivolous appeal and awarded attorney fees on appeal. Because the appeals' court omitted to consider the fact that judge Smith from the district court in his Order of June 30, 1992, misrepresented fact, so, petitioner filed a timely Petition for Rehearing. The appeals' court denied Petition for Rehearing. As a result the appeals' court not only allowed petitioner's civil rights to be violated but also petitioner's U.S. Constitutional Rights to equal protection and equal privileges under the law be deprived because of petitioner's race and national origin and pay

for the imposed sanction and attorney fees for appeal to respondent.

1. This unprecedented ruling depicts serious abuse of discretion. Because judge Smith from the district court in his Order of June 30, 1992, misrepresented fact and stated "The Court entered its judgment on September 5, 1990. Therefore, his motion alleging fraud under Rule 60(b)(3) is untimely." (See App. C, under Law and Analysis). This is misrepresentation of fact because judge Smith perpetrated fraud in his Opinion and Order of February 12, 1991, in response to petitioner's Rule 59(e) motion to vacate the summary judgment. It should be noted that petitioner filed Rule 60(b)(3) and (b)(6) motion because of, among other things, the judges fraud about facts. Proof, see Brief in Support of the Motion to Vacate Judgment under Rule 60(b)(3) and (b)(6) p. 3 along with the attached Affidavit pp. 9-14, with special emphasis on pp. 13-14, paragraphs 10 and 11, which would show judge Smith's fraud about facts; also see Brief in Support of the Motion to Vacate Judgment under Rule 60(b)(3) and (b)(6) pp. 6-8 along with the attached Affidavit pp. 14-18, paragraphs 12 and 13, which would show fraud of all the judges named therein. Note also that these facts were indicated in the Pro Se Appellant's Brief filed August 28, 1992, in answer to question 2 for facts and in answer to question 3 for law.

This Court should note that judge Smith misrepresented fact, as stated above, to cover-up, because Smith knowing from petitioner's "Motion to Compel Answer to Interrogatories by Plaintiff" that although respondent's counsel in concert with respondent perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests" but did not succeed in defrauding petitioner, because petitioner upon receipt of "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests" from respondent's counsel immediately filed petitioner's "Motion to Compel Answer to Interrogatories by Plaintiff", then Smith in concert with Smith's associate, magistrate Kemp, attempted to deceive and defraud petitioner by and through respondent's counsel by allowing respondent's counsel to write and send to petitioner the

"Stipulation" (See Stipulation attached as an Appendix to Pro Se Appellant's Brief filed August 28, 1992; also note Smith in concert with Smith's associate misrepresented facts in magistrate's Order of Oct. 5, 1989 and April 26, 1990, proof, see Pro Se Appellant's Brief filed August 28, 1992, pp. 6-7, answer to question 2), then Smith realizing that Smith and his associate and respondent's counsel all failed in deceiving and defrauding petitioner [Proof, see the response respondent's counsel received from petitioner and what respondent's counsel wrote to magistrate Kemp and what petitioner did (this Court should note that in Pro Se Appellant's Brief filed August 28, 1992, answer to question 2, appeals' court was asked to order respondent's counsel to produce those)], then Smith allowed respondent's counsel to file motion for summary judgment and granted respondent's motion for summary judgment, then Smith realizing from petitioner's Rule 59(e) motion that neither Smith nor respondent's counsel succeeded in deceiving and defrauding petitioner, so, then Smith affirmed Smith's decision of granting respondent's motion for summary judgment and justified Smith's action by perpetrating fraud about facts in Smith's Opinion and Order of February 12, 1991 (see above), then Smith realizing from petitioner's Rule 60(b)(3) and (b)(6) motion that Smith got caught that Smith perpetrated fraud about facts in Smith's Opinion and Order of February 12, 1991, so, then Smith abused Smith's discretion in considering petitioner's Rule 60(b)(3) and (b)(6) motion and to cover-up Smith's abuse of discretion misrepresented fact and denied petitioner's Rule 60(b) motion and imposed sanction. Note this was presented to appeals' court (see Petition for Rehearing filed February 3, 1993, pp. 2-4).

And not only judge Smith perpetrated fraud about facts in his Opinion and Order of February 12, 1991 (see above), but also construed diametrically opposite factors as one and the same. Proof, note the material quoted below;

> "Even if plaintiff was subject to the alleged pressure to "speed up", plaintiff has admitted that there was no disparate treatment in the applica-

> tion of the pressure. Plaintiff admitted that "all of the pharmacists were under the same pressure in terms of speed". (Plaintiff's deposition p. 171). "(See Opinion and Order, filed Feb. 12, 1991, pp. 9-10);

that is, "pressure to "speed up"", is not same as willfully and deliberately conditioning petitioner, that is, willfully and deliberately experimenting on petitioner, with threat of termination from the employment to increase petitioner's production rate by telling petitioner to give in writing stating "I (petitioner) would improve my checking rate (i.e., prescription checking rate) within the next 30 days or else I should be terminated", and note the condition was allowed to continue for about two years, and note also disparate treatment refer to willfully and deliberately conditioning, that is, willfully and deliberately experimenting on, petitioner with threat of termination from the employment to increase petitioner's production rate [See Brief in Support of the Motion to Vacate Judgment pp. 3-4, and Affidavit pp. 11-12, filed on January 31, 1992, in support of the motion under Rule 60(b)(3) and (b)(6)]. This Court should note that "pressure to "speed up"" is not same as willfully and deliberately conditioning, i.e., experimenting on, petitioner with threat of termination from the employment to increase petitioner's production rate by telling petitioner to give in writing stating "I (petitioner) would improve my checking rate (i.e., prescription checking rate) within the next 30 days or else I should be terminated"; and they are not same not just because of a mere expression in linguistic differences between the two but, rather, a legally valid point. Proof, see Comment b to Section 8A of Chapter 1 Restatement of the Law 2d, Torts (1965) 15; the differentiation between negligence and intentional tort. Note this was indicated to the appeals' court (See Pro Se Appellant's Brief filed August 28, 1992, pp. 2-3, answer to question 2 for facts and p. 8, answer to question 3 for law).

This Court should note that although petitioner in answer to question 3 at p. 8 of the "Pro Se Appellant's Brief" filed August 28, 1992, presented proof by citing Comment b to Section 8A of Chapter 1 Restatement of the Law 2d, Torts (1965) 15, the differ-

entiation between negligence and intentional tort, that "pressure to "speed up"" is not same as willfully and deliberately conditioning, i.e., experimenting on, petitioner with threat of termination from the employment to increase petitioner's production rate (see above), but according to respondent's counsel that never took place [See Affidavit pp. 2-3, paragraph 2, attached in support of the motion under Rule 60(b)(3) and (b)(6) filed on January 31, 1992]. At this juncture this Court should note that the deposition from petitioner was taken at a time when petitioner's interrogatories were pending with respondent's counsel. Keeping this in mind this Court should note what this Court stated about discovery process in footnote 12 in Price Waterhouse:

> "Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her."

See Price Waterhouse v. Hopkins, 490 U.S. 228, 247, 109 S.Ct. 1775, 1789, n. 12 (1989). This Court should also note that this is a violation of the rule of law by judge Smith. Because this Court with respect to the summary judgment motion stated:

> "that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." (See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986)).

Indeed, this Court instructed to use directed verdict, but this

Court stated "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." (See Anderson v. Liberty Lobby, Inc., cited above, at 250-251, 2511). Thus, judge Smith violated the correct legal principles as enunciated by this Court with respect to the summary judgment, and also violated the Notes on 1963 Amendment to Rule 56 as promulgated by the Advisory Committee. Since the Advisory Committee states in its Note to the 1963 Amendment of Rule 56(e):

> "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."

Note these were indicated to the district court in the Brief in Support of the Motion to Vacate Judgment under Rule 60(b)(3) and (b)(6) at p. 4. This Court should also note that as petitioner stated above in paragraph 7, under Statement of the Case, that petitioner filed its response to respondent's summary judgment motion according to the ruling of this Court. Since this Court with respect to the summary judgment motion in a companion case stated:

> "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred."

See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986).

Furthermore, judge Smith also under pretext of opinion violated rules of law to aid and abate respondent's counsel and respondent. Because the instant case has in it aspects of both "mixed motive" and also "mixed motive" and pretext [Proof, see Pro Se Appellant's Brief filed August 28, 1992, pp. 9-10, answer to question 3; also see Brief in Support of the Motion to Vacate Judgment pp. 6-8 and Affidavit pp. 14-18, paragraphs 12 and 13, filed on January 31, 1992, with the motion under Rule 60(b)(3) and (b)(6)], therefore, as stated by this Court referring to its previous rulings involving "mixed-motives" in Price Waterhouse (See Price Waterhouse v. Hopkins, cited above, at 248-250, 1789-1790), after petitioner proves his case respondent has to bring data to prove by a preponderance of the evidence that: even if petitioner would not have been experimented on with threat of termination to increase petitioner's production rate, petitioner's production rate would have increased to the level of what it was in 1987 and petitioner would have failed to catch error(s); and even if respondent would have reduced the average hourly Rx checking rate for the whole plant to less than what it was in April 1987, petitioner's production rate still would have increased and petitioner would have failed to catch error(s). Respondent has to bring the latter set of data also because respondent and its agents knowing for sure that if one is made to check fast would certainly make mistake, willfully and deliberately conditioned, that is, willfully and deliberately experimented on, petitioner with threat of termination to increase petitioner's production rate, and allowed the condition to continue for about two years, and then knowing that petitioner failed to catch an error within 30 days of the first Notice of Disciplinary Action, then under pretext of giving an opportunity to correct deliberately and maliciously shifted and set the condition to 90 days while respondent kept the plant's productivity same as before without even lowering the plant's average Rx checking rate. Note this was indicated to the appeals' court (See Pro Se Appellant's Brief filed August 28, 1992, pp. 9-10, answer to question 3). And since judge Smith realizing that Smith and his associate and respondent's counsel all failed in deceiving and defrauding petitioner even though respondent's counsel in

concert with respondent perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests" then Smith allowed respondent's counsel to file motion for summary judgment (see above). Therefore, according to the guidelines set forth by this Court in Price Waterhouse (cited above), respondent's counsel was supposed to submit in support of the motion with respondent's motion for summary judgment data to prove by a preponderance of the evidence that: even if petitioner would not have been experimented on with threat of termination to increase petitioner's production rate, petitioner's production rate would have increased to the level of what it was in 1987 and petitioner would have failed to catch error(s); and even if respondent would have reduced the average hourly Rx checking rate for the whole plant to less than what it was in April 1987, petitioner's production rate still would have increased and petitioner would have failed to catch error(s). Note respondent's counsel has not submitted any such data in support of the motion for summary judgment (See Defendant's Motion for Summary Judgment). Note this was presented to the appeals' court (See the Petition for Rehearing filed February 3, 1993). Also note that appeals' court judges perpetrated fraud about this [See Pro Se Appellant's Brief filed August 28, 1992, p. 9, and Brief in Support of the Motion to Vacate Judgment pp. 6-8, and Affidavit pp. 14-18, paragraphs 12 and 13, filed January 31, 1992, with the motion under Rule 60(b)(3) and (b)(6)].

Rule 60(b) motion is addressed to the sound discretion of the court and in exercising its discretion under F.R.C.P. 60(b), the court is to be guided by an equitable principles. Wright and Miller, Federal Practice and Procedure: Civil Section 2875. Judge Smith has abused discretion in considering petitioner's Rule 60(b) motion and to cover-up his abuse of discretion misrepresented fact and denied petitioner's motion in his Order of June 30, 1992 (See App. C). And Smith abused discretion after realizing that Smith got caught that Smith perpetrated fraud about facts in his Opinion and Order of February 12, 1991, so, Smith abused discretion to cover-up and misrepresented fact as shown above (See also Pro Se Appellant's Brief filed August 28, 1992, pp. 8-9, answer

to question 3). And now appeals' court abused its discretion in affirming district court's decision (See App. A) and denying petitioner's Petition for Rehearing (See App. B).

This is an abuse of discretion by the appeals' court not only because judge Smith from the district court abused discretion in considering petitioner's Rule 60(b)(3) and (b)(6) motion as shown above, but also because the citations cited by the appeals' court in support of its decision to affirm the district court's decision have no bearing to the facts of the instant case. Since none of cases cited at page 2 by the appeals' court in its Order of January 25, 1993, in support of the district court's decision to deny petitioner's Rule 60(b)(3) and (b)(6) motion have any claim of fraud by either attorneys or judges (See App. A, references cited at p. 2), whereas in the instant case petitioner proved fraud by judges and provided evidence of fraud and conspiracy and dirty tricks by attorneys (see above). Likewise, the case cited by the appeals' court in its Order of January 25, 1993, page 2, e.g., Mastini v. American Tel. & Tel. Co., 369 F.2d 378, 379 (2d Cir. 1966), cert. denied, 387 U.S. 933 (1967) (See App. A, p. 2), can easily be distinguished from the facts of the instant case. Because in the Mastini case there was no claim of fraud by judges, whereas in the instant case there is direct proof of fraud about facts by judges (see above). Although, in Mastini case there was claim of fraud but there was no claim of fraud by attorneys. Besides, in Mastini case the appeals' court stated "the allegations of fraud were not substantiated." (See Mastini v. American Tel. & Tel. Co., cited above, at p. 379), whereas in the instant case none of the justices have been able to claim that.

Moreover, the appeals' court judges Kennedy, Suhrheinrich and Wellford's statement "the arguments presented in Mr. Hazra's Rule 60(b) motion have been repeatedly rejected by the district court and this court on appeal." (See App. A, p. 2), is not true. Because as stated above and also in the Affidavit submitted in support of the Rule 60(b) motion at pp. 14-18, paragraphs 12 and 13, that since petitioner did not see in appellate court judges Merritt, Keith and Celebrezze's Order of July 22, 1991, any mention of "mixed motive", so, petitioner in Petition

for Rehearing, among other things, informed the appeals' court that the court omitted to consider "mixed motive" (See Petition for Rehearing filed August 1991). Judges Merritt, Keith and Celebrezze in their Order of November 26, 1991, stated "finds no issue of law or fact that was overlooked or misapprehended." (See App. D) and reaffirmed the judgment of judge Smith of the district court. Since this Court has ruled and set guidelines involving "mixed motives" in Price Waterhouse (cited above), and since the instant case has in it aspects of both "mixed motive" and also "mixed motive" and pretext (see above), therefore, it would imply that respondent's counsel fulfilled its obligation by submitting data to prove by a preponderance of the evidence that: petitioner's production rate would have increased to the level of what it was in 1987 and petitioner would have failed to catch error(s) even if petitioner would not have been experimented on with threat of termination to increase petitioner's production rate; and even if respondent would have reduced the average hourly Rx checking rate for the whole plant to less than what it was in April 1987, petitioner's production rate still would have increased and petitioner would have failed to catch error(s). And since petitioner did not receive any such data from respondent's counsel, therefore, petitioner checked the court's docket entry and failed to find any such data entry in the court's docket. And it became apparent that judges Merritt, Keith and Celebrezze perpetrated fraud. And since this Court held that the district court may entertain a Rule 60(b) motion without leave by the appellate court (See Standard Oil Co. of California v. United States, cited above; also see Wright & Miller, Federal Practice and Procedure: cited above), so, on January 31, 1992, petitioner filed Rule 60(b)(3) and (b)(6) motion. And as this Court know by now that on June 30, 1992, the district court, among other things, denied petitioner's motion (See App. C). Therefore, the appeals' court judges contention that "the arguments presented in Mr. Hazra's Rule 60(b) motion have been repeatedly rejected by the district court and this court on appeal." (See App. A p. 2), is without any merit because there is no evidence to support such contention.

The appeals' court judges abused their discretion in affirming the district court's decision of June 30, 1992, and denying petitioner's "Petition for Rehearing" (see above). And since judge Smith from the district court realizing from petitioner's Rule 60(b) motion that Smith got caught that Smith perpetrated fraud about facts to aid respondent's counsel and respondent in his Opinion and Order of February 12, 1991, then abused Smith's discretion in considering petitioner's Rule 60(b) motion and to cover-up Smith's abuse of discretion misrepresented about fact (see above). Therefore, this Court should reverse the appeals' court decision. For the sake of arguments, even if it is considered that judge Smith entered his judgment on September 5, 1990, although Smith perpetrated fraud about facts to aid and abate respondent's counsel and respondent in response to petitioner's Rule 59(e) motion in his Opinion and Order of February 12, 1991, still it would constitute an abuse of discretion. Because in the instant case fraud was perpetrated by attorneys and judges, and subdivision (b)(6) authorizes relief for "any other reason justifying relief from operation of the judgment". And as this Court because of attorney's involvement in fraud, after 9 years of appellate mandate, vacated and reversed the lower court order in Hazel-Atlas Glass Co. (See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 332, U.S. 238, 64 S.Ct. 997 (1944)), so, this Court should vacate and reverse the lower court's order. This Court should reverse appellate mandate and remand to lower court not only because the appeals' court and the district court have abused discretion but also because although judge Smith in concert with his associate and respondent's counsel did attempt to deceive and defraud petitioner to sign "Stipulation" to nullify the issues, but have failed (see above), that is, issues are not moot. And as petitioner shown, even respondent counsel's law firm also involved in fraud, deception and dirty tricks (See Pro Se Appellant's Brief filed August 28, 1992, pp. 5-6, answer to question 2). And since aside from petitioner's civil rights violation now respondent, its affiant-deponent, its Labor and Associate Counsel, respondent's counsel and their law firm have conspired to violate petitioner's U.S. Constitutional Rights to equal protec-

tion and equal privileges under the law because of petitioner's race and national origin, and also perpetrated fraud and dirty tricks; and since the district court and the appellate court by abuse of discretion deprived petitioner's Constitutional Rights and civil rights, therefore, for the sake of justice, this Court should reverse appeals' court Order and direct the appeals' court to order the district court to allow petitioner to proceed to trial to prove petitioner's claim and to that end to amend petitioner's complaint as requested in Pro Se Appellant's Brief and Rule 60(b)(3) and (b)(6) motion.

2. Imposition of sanction on petitioner depicts serious abuse of discretion. Because this Court ruled that the district court may entertain a Rule 60(b) motion without leave by the appellate court (See Standard Oil Co. of California v. United States, cited above; also see Wright & Miller, Federal Practice and Procedure: cited above) and since attorneys and judges perpetrated fraud about facts (Proof, see above as well as Affidavit submitted in support of the Rule 60(b)(3) and (b)(6) motion), so, petitioner filed Rule 60(b)(3) and (b)(6) motion in the district court. Judge Smith from the district court denied petitioner's Rule 60(b) motion and imposed sanction pursuant to Rule 11 in his Order filed June 30, 1992 (See App. C). Imposition of sanction by the district court and its affirmance by the appeals' court is an abuse of discretion. Because this Court has now set forth standard of review for Rule 11 violation determination and held:

> "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2461 (1990). It is an abuse of discretion because judge Smith from the district court perpetrated fraud about facts to aid and

abate respondent's counsel and respondent in his Opinion and Order of February 12, 1991, and now Smith realizing from petitioner's Rule 60(b)(3) and (b)(6) motion that Smith got caught that Smith perpetrated fraud about facts, so, abused Smith's discretion in considering petitioner's Rule 60(b)(3) and (b)(6) motion, and to cover-up Smith's abuse of discretion misrepresented fact and denied petitioner's Rule 60(b) motion (see above; note it was indicated in the Pro Se Appellant's Brief filed August 28, 1992, answer to question 4), and imposed sanction (See App. C). Affirmance of the imposition of sanction by the appeals' court in its Order of January 25, 1993 (See App. A) and its denial of petitioner's "Petition for Rehearing" in its Order of February 23, 1993 (See App. B) is an abuse of discretion, not only because it is not in accordance to this Court's standard of review for Rule 11 violation determination (see above; note it was indicated in the "Petition for Rehearing" filed February 3, 1993, pp. 5-6) but also because affirmance of judge Smith's denial of petitioner's Rule 60(b) motion is an abuse of discretion by the appeals' court as shown above. And award of attorney fees for appeal is an equally abuse of discretion. Therefore, this Court should reverse appellate mandate.

In summary, district court and appeals' court abuse of discretion should not be allowed to sustain to benefit respondent's counsel and its Labor and Associate Counsel and respondent, because they are attorneys and perpetrated fraud, aside from judges fraud about facts. Therefore, this Court should do what it has done in Hazel-Atlas Glass Co. v. Hartford-Empire Co., (cited above) for attorneys involvement in fraud. That is, this Court should vacate and reverse the appeals' court decision of 1993 with directions to appeals' court to set aside and to recall all of its mandates, and to issue mandate to the district court to reverse its order and to deny respondent's summary judgment motion and to allow petitioner to proceed to trial to prove petitioner's claim and to that end to allow petitioner to amend complaint pursuant to F.R.C.P. Rule 15(a) and (c) as requested in appellant's brief and Rule 60(b)(3) and (b)(6) motion. This Court should not allow lower courts' abuse of discretion to sustain because aside from

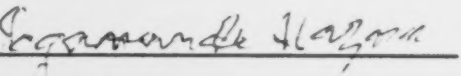
petitioner's civil rights violation now respondent, its affiant-deponent, its Labor and Associate Counsel, respondent's counsel and their law firm have conspired to violate petitioner's U.S. Constitutional Rights to equal protection and equal privileges under the law because of petitioner's race and national origin, and also perpetrated fraud and dirty tricks. And sustenance of lower courts' abuse of discretion would mean deprivation of petitioner's Constitutional Rights to equal protection and equal privileges under the law, which lower courts have done by abuse of discretion. Likewise, this Court should also vacate and reverse the appeals' court decision of 1993 mandating payment for sanction and attorney fees with direction to appeals' court to set aside and to recall all of its mandates, and to issue mandate to the district court reversing imposition of sanctions and ordering respondent to refund to petitioner all the money respondent has collected with interest, and to award to petitioner double the amount on costs related to the lawsuit because of fraud of respondent's counsel and its Labor and Associate Council in concert with respondent, and any other steps this Court wishes to take for the administration of justice.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

DATED: May 18, 1993.

Respectfully submitted,



Jogananda Hazra

Petitioner, pro se

No. 92-3770

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed January 25, 1993
Leonard Green, Clerk

JOGANANDA HAZRA,	)	
Plaintiff-Appellant,	)	
v.	)	ORDER
NATIONAL Rx SERVICES, INC.,	)	
Defendant-Appellee	)	NOT RECOMMENDED
	)	FOR FULL-TEXT
	)	PUBLICATION

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges, and WELLFORD, Senior Circuit Judge.

Jogananda Hazra, an Ohio citizen, appeals pro se from a district court order denying his motion filed pursuant to Fed. R. Civ. P. 60(b)(3) and (6), and imposing Fed. R. Civ. P. 11 sanctions in favor of the defendant, in this action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 621. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Mr. Hazra sought reinstatement, back pay, and punitive damages in this suit, alleging that he had been discharged from his position as a pharmacist on October 30, 1987, on the basis of his age, race, and national origin. The defendant moved for summary judgment, based on evidence that the discharge was due to frequent errors in checking prescriptions in violation of

an established policy. The district court granted defendent's motion and subsequently denied Hazra's Federal R. Civ. P. 59(e) motion to alter or amend. This court affirmed the district court's decision in an order filed July 22, 1991. On January 31, 1992, Mr. Hazra filed his motion to vacate judgment pursuant to Fed. R. Civ. P. 60(b)(3) and (6). The defendant filed a motion for sanctions on February 11, 1992. In an order filed June 30, 1992, the district court denied the Rule 60(b) motion and imposed sanctions against Mr. Hazra in the amount of $2,173.75. This timely appeal followed. This court reviews the June 30, 1992, order to determine whether the district court abused its discretion in denying Mr. Hazra relief under Rule 60(b). *In re Salem Mortgage Co.*, 791 F.2d 456,459 (6th Cir. 1986); *Smith v. Secretary of Health and Human Services*, 776 F.2d 1330, 1332 (6th Cir. 1985); *Windsor v. United States Dep't of Justice*, 740 F.2d 6, 7 (6th Cir. 1984) (per curiam). An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. *See In re Bendectin Litigation*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156-57 (6th Cir. 1988).

Upon view, we conclude that the district court did not abuse its discretion in denying Mr. Hazra's motion to vacate judgment filed pursuant to Fed. R. Civ. P. 60(b)(3) and (6). Mr. Hazra's Rule 60(b) motion insofar as it alleged fraud was not filed within the time required by the rule. Thus, it was within the district court's considerable discretion to deny relief under this particular subsection.

Subsection (b)(6) will be properly invoked in "usual and extreme situations where principles of equity *mandate* relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (original emphasis). Not only were no exceptional circumstances presented in this case, but the arguments presented in Mr. Hazra's Rule 60(b) motion have been repeatedly rejected by the district court and this court on appeal. A Rule 60(b) motion must be denied if, as here, it is merely an attempt to relitigate the case. *See Mastini v. American Tel. & Tel. Co.*, 369 F.2d 378, 379 (2nd Cir. 1966), *cert. denied*, 387 U.S. 933 (1967).

The test for the imposition of Rule 11 sanctions is whether the individual's conduct was reasonable under the circumstances. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). With this standard in mind, our review of the record and briefs leads us to the conclusion that the district court did not abuse its discretion when it imposed sanctions. *See Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). Similarly, we conclude that this appeal is equally frivolous, and that defendant should receive its attorney fees on appeal. 28 U.S.C. § 1912; Fed. R. App. 38; *Wrenn v. Gould*, 808 F.2d 493, 504 (6th Cir. 1987). Accordingly, the defendant may submit a bill for attorney fees within fourteen days of this order.

The order denying Mr. Hazra relief under Rule 60(b) and awarding attorney fees in favor of the defendant is affirmed pursuant to Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/s

Clerk

No. 92-3770

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed February 23, 1993
Leonard Green, Clerk

JOGANANDA HAZRA	)	
Plaintiff-Appellant	)	
v.	)	ORDER
NATIONAL Rx SERVICES, INC.	)	
Defendant-Appellee	)	

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

s/s

Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed June 30, 1992
Kenneth J. Murphy, Clerk

JOGANANDA HAZRA,

Plaintiff,

v. Case No. C-2-89-0551

NATIONAL Rx SERVICES, INC.,

Defendant

ORDER

This matter is before the Court upon Plaintiff Jogananda Hazra's Motion to Vacate Judgment and Defendant National Rx Services, Inc.'s Motion of Defendant to Award Sancations for Filing of Frivolous Pleading.

BACKGROUND

Plaintiff Hazra, a pro se litigant, brought this case in June of 1989 alleging that he was discharged from his employment with Defendant National Rx Services, Inc. because of his race, nationality, and age.

The Court granted Defendant's Motion for Summary Judgment on September 5, 1990, dismissing all of Plaintiff Hazra's claims.

On September 14, 1990, the Plaintiff filed a motion to vacate the Court's September 5, 1990 Order under Federal Rule of Civil Procedure 59(e). Though not raising even a scintilla of additional evidence suggesting that there was in fact unlawful

discrimination, the Plaintiff, inter alia, alleged that this Court's ruling was based upon collusion with counsel for the Defendant which lead to a "cover-up" and ultimately fraud. The Court denied Plaintiff's motion.

The Plaintiff then proceeded to appeal this Court's ruling to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals issued its Order affirming the ruling of this Court on July 22, 1991.[1]

All told, Plaintiff Hazra has raised precisely the same agruments on four separate occasions in two different courts.

Plaintiff now asks the Court to vacate its earlier judgment under Rules 60(b)(3) and (6) of the Federal Rules of Civil Procedure.

LAW AND ANALYSIS

Federal Rule of Civil Procedure 60(b) is applicable to the instant matter and provides, in pertinent part:

> On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

The Court entered its judgment on September 5, 1990. Therefore, his motion alleging fraud under Rule 60 (b)(3) is untimely.

Further, the Plaintiff offers no new evidence or fresh argument to suggest that he has a cause of action under Rule 60(b)(6) that would lead the Court to alter its earlier judgment.

---

[1]The Court of Appeals, on November 26, 1991, denied Hazra's Petition for Rehearing.

Accordingly, Plaintiff Jogananda Hazra's Motion to Vacate Judgment is hereby **DENIED**.

Defendant has requested that this Court award sanctions against the Plaintiff under its authority pursuant to Rule 11 of the Federal Rules of Civil Procedure.

Though the Court is generally hesitant and always cautious when considering the imposition of sanctions, particularly when the adverse party is proceeding pro se, any lesser action would be inappropriate in the instant matter.

The Court has little doubt that the Plaintiff believes that he has been wronged. However, as each of the previous ruling of this Court and the Sixth Circuit have stated, there is simply no evidence to support his claims. Simply because the Plaintiff believes something does not make it so.

This Court has allowed the Plaintiff to proceed in this utterly frivolous and unconscionable litigation far too long at a significant costs to the Defendants and the Courts. Plaintiff's Motion to Vacate Judgment has further unnecessarily and wastefully prolonged this litigation.

For the reasons as set forth above, the Court hereby **ORDERS** that Plaintiff Jogananda Hazra be **SANCTIONED** in the amount of **$2,173.75**. Said sum is based upon the expenses incurred by the Defendant in defending against Plaintiff's latest frivolous pleading.[2]

CONCLUSION

Plaintiff's Motion to Vacate Judgment is hereby **DENIED**.

Defendant's Motion for Sanctions is hereby **GRANTED**. Plaintiff is hereby **SANCTIONED** in the amount of **$2,173.75**.

IT IS SO ORDERED.

s/s

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

[2]Plaintiff is hereby forewarned that, absent additional or new evidence, that any further pleadings or appeal in the instant matter shall be deemed frivolous and the Plaintiff will be subject to further sanctions.

No. 91-3201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed November 26, 1991
Leonard Green, Clerk

JOGANANDA HAZRA,	)	
Plaintiff-Appellant,	)	
v.	)	ORDER
NATIONAL Rx SERVICES, INC.,	)	
Defendant-Appellee.	)	
	)	

BEFORE: MERRITT, Chief Judge; KEITH, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

The appellant has petitioned the court to rehear its decision of July 22, 1991, affirming the judgment of the district court. Appellee has moved for an award of costs and attorney fees.

The court has considered the petition for rehearing and finds no issue of law or fact that was overlooked or misapprehended.

Furthermore, the court finds that the appellee is entitled to its costs of $1,380.25 under Fed. R. App. P. 39. The court finds that this is not a proper case for an award of attorney fees.

It is therefore **ORDERED** that the petition for rehearing is denied, the motion for costs is granted in the amount of $1,380.25, and the motion for attorney fees is denied.

ENTERED BY ORDER OF THE COURT

s/s
Clerk

APPENDIX D

93-27

No. _____

Supreme Court, U.S.
FILED
AUG 02 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOGANANDA HAZRA,
Petitioner,

v.

NATIONAL RX SERVICES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF FOR THE RESPONDENT NATIONAL RX SERVICES, INC. IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Sixth Circuit correct in finding that the district court did not abuse its discretion by refusing to allow petitioner's untimely and groundless motion to vacate, brought pursuant to Fed. R. Civ. P. 60(b)(3) and (6)?

2. Was the United States Court of Appeals for the Sixth Circuit correct in finding that the district court did not abuse its discretion by imposing sanctions against petitioner pursuant to Fed. R. Civ. P. 11 for his abuse of the judicial process through repeated frivolous motions?

PARTIES TO THE PROCEEDING

The petitioner is Jogananda Hazra, an individual resident of Columbus, Ohio. Respondent is National Rx Services, Inc., a wholly owned subsidiary of Medco Containment Services, Inc. ("Medco"). Medco is a publicly owned corporation whose securities are traded on the National Association of Securities Dealers Automated Quotation System (NASDAQ).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. ___

JOGANANDA HAZRA,
Petitioner,

v.

NATIONAL RX SERVICES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF FOR THE RESPONDENT NATIONAL RX SERVICES, INC.

IN OPPOSITION

OPINIONS BELOW

On June 27, 1989, petitioner Jogananda Hazra filed a Complaint against respondent National Rx Services, Inc. (hereafter "National Rx") in the United States District Court for the Southern District of Ohio, Eastern Division, alleging discrimination on the basis of his age, race, and national origin. After discovery, and because it was clear that there were no

facts which could even remotely support the claims of discrimination, and based upon testimony from Hazra which actually negated any basis for such claims, the district court granted National Rx's Motion for Summary Judgment by Opinion and Order filed September 5, 1990. *See* Resp. App. 1a-13a. On September 14, 1990, Hazra filed a Motion to vacate pursuant to Fed. R. Civ. P. 59(e), requesting that the district court vacate its summary judgment ruling. Hazra presented no new arguments, however due to the *pro se* nature of the case, the district court filed an Opinion and Order on February 12, 1991, denying Hazra's Motion to vacate, and giving Hazra the benefit of a further explanation as to why the complaint had been dismissed. *See* Resp. App. 14a-23a.

On February 21, 1991, Hazra filed a Notice of Appeal in the United States Court of Appeals for the Sixth Circuit appealing both the district court's granting of summary judgment and the denial of his motion to vacate the summary judgment order. By Order filed July 22, 1991, the Sixth Circuit affirmed the district court's judgment. *See* Resp. App. 24a-26a. On or about August 2, 1991, Hazra petitioned the Sixth Circuit for a rehearing, again raising the same arguments he had repeatedly raised before. By Order filed November 26, 1991, the Sixth Circuit denied petitioner's request for a rehearing and ordered that petitioner pay National Rx's costs on appeal. *See* Pet. App. D.

On January 31, 1992, Hazra filed yet another Motion to Vacate in the district court, this time pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6), requesting that the court vacate its earlier summary judgment ruling. National Rx filed a Motion for Sanctions on February 11, 1992. By Order filed on June 30, 1992, the district court denied Hazra's Motion to Vacate,

and awarded National Rx sanctions against petitioner in the amount of $2,173.75. *See* Pet. App. C.

Hazra filed a Notice of Appeal to the Sixth Circuit on July 28, 1992, appealing both the denial of his Motion to Vacate and the award of sanctions against him. In an Order filed January 25, 1993, the Sixth Circuit declared Hazra's appeal to be frivolous. Accordingly, the Sixth Circuit affirmed the district court's rulings and additionally awarded National Rx costs and attorneys fees on appeal. *See* Pet. App. A. On February 2, 1993, Hazra filed yet another Petition for Rehearing with the Sixth Circuit. By Order filed February 23, 1993, the Sixth Circuit denied Hazra's request for a rehearing. *See* Pet. App. B.

JURISDICTION

The Order for the United States Court of Appeals for the Sixth Circuit denying petitioner's request for a rehearing was issued on February 23, 1993. On June 29, 1993, petitioner filed in this Court his Petition for a Writ of Certiorari. The Petition is untimely pursuant to Sup. Ct. R. 13.1.[1]

[1]Hazra's original petition was filed with the Court on May 18, 1993, and would have been timely if it had complied with the Supreme Court Rules. The petition was returned by the Court for failure to comply with the rules, and was refiled by Hazra on June 3, 1993, again not in compliance with the Court's rules. The current petition was filed on June 29, 1993, approximately 37 days after the deadline for filing the petition.

RULES AND PROVISIONS INVOLVED

Fed. R. Civ. P. 60(b) states in pertinent part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * * *
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> * * * *
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 11 states in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose

address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. ...The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the singer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. § 1912 states in its entirety:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Lastly, Fed. R. App. P. 38 provides in its entirety:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

The facts related herein are taken from the district court's factual findings contained in its earlier orders. Petitioner Hazra is originally from India and of the Asian race. Resp. App. 2a. Hazra was born on May 30, 1935. Resp. App. 2a. Hazra was 47 years old when he was hired as a junior pharmacist by National Pharmacies, Inc., a co-subsidiary of National Rx, in April, 1983. Resp. App. 2a. Hazra has admitted that he was not discriminated against because of his age, race or national origin at the time of his hiring in 1983. Resp. App. 2a.

In February, 1984, Hazra voluntarily transferred from his position with National Pharmacies, Inc., to a job in Ohio with the respondent National Rx. Resp. App. 2a. National Rx operates a mail service pharmacy in Columbus, Ohio, whereby patient prescriptions are filled and provided to the patients by

mail. Resp. App. 2a. Under Ohio law, a licensed registered pharmacist must review, check and approve each prescription that is dispensed by the company. Resp. App. 2a.

After his transfer, Hazra registered as a pharmacy intern in order to become a licensed pharmacist. Resp. App. 2a. To become registered, the intern must work under the supervision of a registered pharmacist or "preceptor." Resp. App. 2a-3a. National Rx agreed to act as Hazra's "preceptor," and with the respondent's help, Hazra eventually became a registered pharmacist. Resp. App. 3a.

On March 5, 1985, National Rx hired Hazra for the position of registered pharmacist. Resp. App. 3a. Hazra admitted that there was no discrimination in the hiring of him for the position, which included a raise in pay. Resp. App. 3a.

Under Ohio law, Ohio Revised Code, Chapter 4729 and the Ohio Administrative Code, Chapter 4729-1, *et seq.*, each registered pharmacist is required to ensure that each drug that he or she dispenses to a patient is the same drug that the physician prescribed to the patient. Resp. App. 3a. According to Hazra's own testimony, the registered pharmacist had the additional responsibility of ensuring that the label on the prescribed bottle correctly identified the dispensed drug, and with respect to this responsibility, the pharmacist was held strictly accountable by National Rx if the wrong drug, or the wrong strength of the drug, was prescribed to the patient. Resp. App. 3a.

In the Spring of 1987, National Rx adopted a disciplinary policy for staff registered pharmacists who committed dispensing errors. Resp. App. 3a. The disciplinary policy

called for corrective action whenever a staff registered pharmacist dispensed a prescription that resulted in the patient receiving the wrong drug, the wrong strength, the wrong dosage or form of the drug, or the equivalent generic form of the drug where the brand name drug was prescribed. Resp. App. 3a-4a. Under the disciplinary policy, National Rx reviewed each situation independently and employed various disciplinary measures, including counselling, warning, probation, and termination. Resp. App. 4a. As a general guideline under the policy, a staff registered pharmacist was warned and placed on probation if he or she committed three significant dispensing errors within a three month period. Resp. App. 4a. Examples of a significant dispensing error would be erroneously providing the patient with the wrong strength of drug, or the wrong drug altogether. Resp. App. 4a. The policy further provided that any further dispensing error during the probationary period could result in termination. Resp. App. 4a. Hazra admitted that in early 1987, the policy was communicated to all of the pharmacists at National Rx over a one month period during the weekly meetings, and that the policy was a "guideline" for disciplinary action and would be applied on a case-by-case basis. Resp. App. 4a.

On May 12, 1987, Hazra dispensed a drug which was double the strength prescribed by the physician. Resp. App. 4a. Hazra's supervisor met with him and counselled him as to the importance of accuracy. Resp. App. 4a.

On June 26, 1987, Hazra again dispensed a drug which was double the strength prescribed by the physician. Resp. App. 4a. Instead, the prescription was filled with 500 milligram tablets, double the strength of the actual prescription. Resp. App. 4a-5a. Hazra's supervisors met with

him again and cautioned him to be more careful. Resp. App. 5a.

A few days later, Hazra was again reprimanded for erroneously dispensing a sublingual form of a drug (to be placed under the tongue of the patient) rather than the prescribed oral form of the drug (to be swallowed). Resp. App. 5a. The plaintiff acknowledged that this was his third error in two months, and that he could have been discharged pursuant to the disciplinary policy for making the errors, if National Rx had chosen to terminate him. Resp. App. 5a. Instead, the plaintiff was placed on probation and informed that any additional mistakes in the next 60 days would result in his termination. Resp. App. 5a.

Less than thirty days later, Hazra committed another dispensing error. Resp. App. 5a. Hazra acknowledged that although he again could have been terminated for this mistake pursuant to the disciplinary policy, he was given yet another chance. Resp. App. 5a. Hazra was placed on 90 days probation and again was told that any additional errors during the probation period would result in his termination. Resp. App. 5a.

In October, 1987, during his second probationary period, Hazra committed two more serious dispensing errors. Resp. App. 5a. In both instances Hazra dispensed the wrong drug. Resp. App. 5a. Hazra acknowledged that the medication that was sent to each patient was not the medication that had been prescribed. Resp. App. 5a.

Based on the six serious dispensing errors committed by Hazra, National Rx terminated Hazra's employment on October 30, 1987, pursuant to the terms of the disciplinary

policy. Resp. App. 5a. Hazra has admitted his errors and does not refute, in the least, National Rx's stated basis for his termination. Resp. App. 5a.

The district court granted National Rx's motion for summary judgment, stating, "The Court has been provided no evidence upon which it could conclude that the defendant applied the [disciplinary] policies disparately...." Resp. App. 12a. The district court ruled further:

> The plaintiff has admitted that he could not name another person who had more errors that had not been terminated, and he further admitted that the errors were the reason for this termination [citation omitted]. Therefore, there appears to have been equal application of the policies to all employees at National Rx.
>
> Based upon the aforementioned reasons the Court finds that there is no question of material fact, and that the plaintiff has failed to make even a prima facie showing of discrimination, which is needed to prevail as a matter of law.

Resp. App. 12a. Thus, Hazra's claims failed from the outset on the basis of his own testimonial admissions and his failure to produce any evidence or inference in support of his discrimination claims.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Sixth Circuit properly affirmed the district court's denial of petitioner's motion to vacate pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6). Petitioner's only stated ground for the motion was an allegation of fraud by defendants, by the district court, and by the court of appeals. A motion filed pursuant to Rule 60(b)(3) must be filed within a reasonable amount of time after the judgment and in no event more than one year from the judgment. Petitioner's motion, brought more than one year after the judgment, was untimely. Petitioner's attempt to circumvent the one year limitation by citing 60(b)(6) was improper. Furthermore, notwithstanding the timeliness issue, the Rule 60(b) motion was properly denied on its merits, because the petitioner came forward with no evidence in support of the motion. The only arguments raised in Hazra's 60(b) motion were those which had already been raised and rejected twice by the district court and twice by the court of appeals. In order to prevail on a Rule 60(b) motion, a movant must show by a preponderance of the evidence that fraud or some other impropriety was involved in the judgment. Petitioner was merely using the Rule 60(b) motion as an attempt to relitigate his claims. The denial of the motion was within the sound discretion of the district court, and no abuse of that discretion occurred.

The United States Court of Appeals properly affirmed the district court's imposition of sanctions pursuant to Fed. R. Civ. P. 11. The district court's sanctions were based upon petitioner's filing of a frivolous and unsupported motion to vacate the court's earlier summary judgment ruling. The motion was patently frivolous in that it failed to raise any additional evidence or arguments, relying instead upon the

same arguments which had already been twice rejected by each the district court and the court of appeals. Due to the patently frivolous nature of the petitioner's motion, the imposition of sanctions was well within the court's discretion under Rule 11. The amount of the sanctions was likewise reasonable within the discretion of the district court.

The United States Court of Appeals properly granted sanctions against the petitioner pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38 for filing a frivolous appeal relating to the denial of his 60(b) motion. Petitioner had previously attempted to vacate the same summary judgment ruling by filing a Fed. R. Civ. P. 59(e) motion, which was denied. The petitioner appealed the denial of the 59(e) motion, and the court of appeals affirmed the denial of the motion. Petitioner, nevertheless, brought a Rule 60(b) motion with not one strand of additional grounds or evidence. The court of appeals properly imposed sanctions for petitioner's repeated frivolous attempts to relitigate his unsupported claims. The imposition of sanctions was within the discretion of the court of appeals, and no abuse of that discretion occurred.

ARGUMENT

The Rules of the United States Supreme Court make clear that "review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. Here the district court and the court of appeals have repeatedly held on the undisputed facts that petitioner's claims of discrimination fail as a matter of law. Petitioner has filed incessant appeals, motions for rehearings, and motions to vacate in an attempt to change this result. However, other than expressing disagreement and disappointment with the result, petitioner offers no legitimate reason why this Court should review the decisions below.

Nothing in the petition for writ of certiorari, or in the case as it developed below, presents a valid reason for granting review in this case. The decisions of the lower federal courts are correct on the merits, and there are no conflicts with decisions of this Court or with decisions of the federal circuit courts of appeal. In addition, there is no important question of federal law raised by the petition. In fact, the petitioner expresses only disagreement with the rulings of the courts below and their exercise of discretion in awarding sanctions against him. The decisions of the both the district court and the court of appeals are consistent with the "accepted and usual course of judicial proceedings" and present no "special or important reasons" for granting a writ of certiorari in this case. Sup. Ct. R. 10.

I. THE DISTRICT COURT PROPERLY REFUSED TO VACATE ITS EARLIER JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)(3) and (b)(5).

On January 31, 1992, Hazra filed a motion with the district court pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6) alleging "fraud," and requesting that the district court vacate its September 5, 1990 Order granting defendant's motion for summary judgment. Both the motion and the brief in support contained rambling and incoherent allegations of fraud by National Rx, National Rx's in-house counsel, National Rx's outside counsel, United States District Judge George C. Smith, and United States Court of Appeals Judges for the Sixth Circuit Damon J. Keith, Anthony J. Celebrezze, and Chief Judge

Gilbert S. Merritt.[2] The following excerpt reveals the tone and content of Hazra's brief to the district court:

> Because the defendant obtained summary judgment by perpetrating fraud on plaintiff in answer to plaintiff's interrogatories by and through Defendant's Labor and Associate Counsel and Defense Counsel, and thereby preventing the plaintiff to prove his claim, and judge Smith from this Court perpetrated fraud and by irregular decision granted and affirmed the defendant's summary judgment motion, and appellate judges Merritt, Keith and Celebrezze perpetrated fraud and by irregular decision granted and affirmed the judgment of judge Smith which in itself is the product of fraud and irregular decision, therefore, the plaintiff is demanding that for the sake of justice the court vacate and set aside the judgment of judge Smith and the defendant's summary judgment motion be denied, and the plaintiff be allowed to proceed to trial to prove his case....

Petitioner's Brief in Support of The Motion to Vacate Judgment, filed in the district court on January 31, 1992, at 8-9 (quoted as appears in original). Hazra's motion, brief and affidavit contained nothing more than rambling unsupported allegations of fraud against everyone who had argued or

[2] In his Petition for Rehearing to the United States Court of Appeals for the Sixth Circuit, filed on August 28, 1992, Hazra had additionally alleged that Magistrate Judge Terrence P. Kemp had "attempted to deceive and defraud" him (emphasis in original).

decided a motion unfavorably toward him. He used the "fraud" label to get his foot in the door of Rule 60(b), but once in, Hazra offered no new arguments or evidence, rather he simply reiterated his already rejected arguments on the merits of his case. Hazra's own submissions leave serious doubt as to whether he comprehends the meaning of the term "fraud."

This case is actually a garden variety *pro se* case which includes no novel arguments or evidence. The case certainly does not involve "fraud." Rather, the petitioner has used the label of "fraud" to express his dissatisfaction with the results of his case, and to attempt to reargue his case yet again. Cases of this type are repeatedly addressed by the federal district courts and courts of appeal, and the courts in this case handled petitioner's claims within the usual course of judicial proceedings.

Vacation of a prior judgment upon grounds of fraud falls exclusively under Fed. R. Civ. P. 60(b)(3). A motion filed pursuant to Fed. R. Civ. P. 60(b)(3) must be filed "within a reasonable time" and in any case "not more than one year after the judgment...was entered or taken." Fed. R. Civ. P. 60(b). As the district court found, summary judgment was granted against the petitioner on September 5, 1990, and his Rule 60(b) motion was filed on January 31, 1992, more than one year after the judgment. Pet. App. C. Thus, as both the district court and the court of appeals noted in their Orders, Hazra's Fed. R. Civ. P. 60(b) motion based upon fraud was untimely. Pet. App. A at 2; Pet. App. C. Hazra, likewise, has made no attempt in his petition to this Court to argue that his motion pursuant to 60(b)(3) was timely.

The case law demonstrates that the rulings of both the district court and the court of appeals in this case were within the "accepted and usual course of judicial proceedings." *See* Sup. Ct. R. 10. In *Gonzalez v. Walgreens Co.*, 918 F.2d 303 (1st Cir. 1990), the court held that, "Appellants' failure to file their Rule 60(b)(3) motion within one year of the judgment 'is an absolute bar to relief from the judgment.' [Citation omitted.]." *Id.* at 305; *see also Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1062 (N.D.Ga. 1990).

Hazra's alternative reliance upon Fed. R. Civ. P. 60(b)(6) was also misplaced. Where a 60(b) motion based upon fraud is untimely, the movant cannot utilize the 60(b)(6) "catchall" in an attempt to avoid the one year limitation period. Fed. R. Civ. P. 60(b)(6) may only be utilized where none of the specifically enumerated grounds, (*i.e.*, (b)(1)-(b)(5)), for a 60(b) motion are relied upon. *Klapprott v. United States*, 335 U.S. 601, 613 (1949), *modified*, 336 U.S. 942, *motion denied*, 336 U.S. 949 (1949); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 845, 863 and n.11 (1988). This Court has consistently recognized that where, as here, the alleged fraud falls under 60(b)(3), the one year maximum limitation period for filing the motion to vacate is mandatory and cannot be circumvented through the use of 60(b)(6). *Id.*; *see also Smith v. Sec. of Health and Human Services*, 776 F.2d 1330 (6th Cir. 1985)("'[I]t is settled that an appellant cannot circumvent the one year limitation by invoking the residual clause (6) of Rule 60(b).'" *Id.* at 1333 (citation omitted)).

Leaving aside the issue of untimeliness, petitioner's 60(b) motion was properly denied because it had no merit. The relief provided by Fed. R. Civ. P. 60(b) is "extraordinary and may properly be granted only when the movant can demonstrate that the conduct challenged hindered it from

making good a claim or defense." *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1121 (6th Cir. 1976). Such relief is available "only under exceptional circumstances." *Id.* As the Sixth Circuit noted, "A Rule 60(b) motion is addressed to the sound discretion of the Court." *Id.* at 1119. Determinations pursuant to Rule 60(b) "'will not be disturbed on appeal unless the court has abused its discretion.'" *Smith v. Sec. of Health and Human Services*, 776 F.2d 1130, 1332 (6th Cir. 1985)(quoting *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir. 1980)); *see also Gonzalez v. Walgreens Co.*, 918 F.2d 303, 304 (1st Cir. 1990). An "'[a]buse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.'" *Amernational Ind., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991), *cert. denied*, -- U.S. -- , 111 S.Ct. 2857, 115 L.Ed.2d 1024 (1991)(quoting *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 132-33 (6th Cir. 1990); *see also Libby v. Illinois High School Ass'n*, 921 F.2d 96 (7th Cir. 1990)("An abuse of discretion generally only occurs where no reasonable person could take the view adopted by the trial court. [Citation omitted.] If reasonable persons could differ, then the appellate court will not be able to find an abuse of discretion." *Id.* at 98.).

The rulings of the lower courts in this case are consistent with the legal standards annunciated above. In denying petitioner's 60(b) motion, the district court held:

> [T]he Plaintiff offers no new evidence or fresh argument to suggest that he has a cause of action under Rule 60(b)(6) that would lead the Court to alter its earlier judgment.

* * * *

> [A]s each of the previous ruling[s] of this Court and the Sixth Circuit have stated, there is simply no evidence to support [petitioner's] claims. Simply because the Plaintiff believes something does not make it so.

Pet. App. C. The court of appeals affirmed the district court's denial of petitioner's 60(b) motion, stating:

> Not only were no exceptional circumstances presented in this case, but the arguments presented in Mr. Hazra's Rule 60(b) motion have been repeatedly rejected by the district court and this court on appeal. A Rule 60(b) motion must be denied if, as here, it is merely an attempt to relitigate the case. *See Mastini v. American Tel. & Tel. Co.*, 369 F.2d 378, 379 (2nd Cir. 1966), *cert. denied*, 387 U.S. 933 (1967).

Pet. App. A at 2.

The district court properly noted that the petitioner's belief or allegation is not enough to satisfy Rule 60(b). In *Jennings v. Hicklin*, 587 F.2d 946 (8th Cir. 1978), the court faced a situation similar to that presented by the petitioner here. The plaintiff in *Jennings* was likewise proceeding *pro se*. The Eighth Circuit affirmed the district court's denial of the 60(b) motion stating:

> Jennings filed his Rule 60(b) motion, which contained lengthy, vague and rambling

> allegations that the judgment had been procured by fraud. ...The district court denied the motion on the bases that Jennings' allegations regarding jurisdiction were totally lacking in merit and that Jennings' allegations of fraud were conclusory and insufficient to justify further action.

Id. at 947.

In so holding, the Eighth Circuit explained the burden of proof for a 60(b) motion, "The burden of proving such fraud and misrepresentation is, of course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence." *Id.* at 948 (citations omitted); *see also Anderson v. Dept. of Health and Human Services*, 907 F.2d 936 (10th Cir. 1990)("We affirm the district court's denial of the Rule 60(b)(3) motion because appellant has not presented 'clear and convincing proof' of fraud, misrepresentation, or misconduct." *Id.* at 952.); *Di Vito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936 (7th Cir. 1966)("conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud, much less to carry the burden of resolving that issue." *Id.* at 939.); *Optimal Health Care Services, Inc. v. Travelers Ins. Co.*, 801 F. Supp. 1558, 1561 (E.D.Texas 1992).

Hazra has made broad conclusory allegations of fraud, but has presented absolutely no evidence to support his claims. The district court noted, "Though not raising even a scintilla of additional evidence suggesting that there was in fact unlawful discrimination, the [petitioner], *inter alia*, alleged that this

Court's ruling was based upon collusion with counsel for the Defendant which lead to a 'cover-up' and ultimately fraud." Pet. App. C. Because petitioner presented no evidence to support the allegations of fraud or other misconduct in his Fed. R. Civ. P. 60(b) motion, such motion was properly denied under the rule and the applicable law.

In reality, Hazra's 60(b) motion was simply another attempt to relitigate the claims he had repeatedly lost.[3] Such use of Fed. R. Civ. P. 60(b) is improper. Rule 60(b) is not to be used to relitigate the merits of a claim. In *Fleming v. New York Univ.*, 865 F.2d 478, (2nd Cir. 1989), the court held that, "a Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits." *Id.* at 484; *see also Mastini v. American Tel. and Tel. Co.*, 369 F.2d 378 (2nd Cir. 1966), *cert. denied*, 387 U.S. 933 (1967). Hazra's original claims were properly dismissed by the court for lack of evidence. His Rule 60(b) motion was, likewise, properly denied because Hazra again presented no evidence to support his claims. The denial of Hazra's Rule 60(b) motion was within the sound discretion of the district court, and no abuse of that discretion has occurred.

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[3] Likewise, Hazra's petition to this Court does not discuss any of the grounds for certiorari, because none are applicable, nor does it discuss the legal issues relevant to Fed. R. Civ. P. 60(b) and 11. Rather, petitioner is only attempting to create yet another opportunity to reargue the "factual merits" of his case.

II. REPEATED FRIVOLOUS MOTIONS AND APPEALS ATTEMPTING TO RELITIGATE ISSUES ALREADY DECIDED BY BOTH THE DISTRICT COURT AND COURT OF APPEALS WERE PROPER GROUNDS FOR THE IMPOSITION OF SANCTIONS.

Hazra has filed a number of frivolous motions during the course of this litigation, including: the Motion to Vacate pursuant to Fed. R. Civ. P. 59(e), the appeal of the denial of his 59(e) motion, the Petition for Rehearing to the Sixth Circuit regarding his loss of the appeal on his 59(e) motion, the Motion to Vacate pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6), the appeal of the denial of his 60(b) motion, the Petition for Rehearing to the Sixth Circuit regarding his loss of the appeal on his 60(b) motion, and the Petition for a Writ of Certiorari to this Court, all of which had no basis in law or fact. As such, they are also violations of Fed. R. Civ. P. 11, 28 U.S.C. § 1912, and Fed. R. App. P. 38. Hazra has repeatedly presented the United States District Court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit, and now this Court, with pleadings, motions and other papers which contain outlandish conclusory allegations wholly unsupported by any evidence. Notwithstanding this clear abuse of judicial process from the outset, National Rx never even moved the court for sanctions until after Hazra had been repeatedly informed by the district court that his case was baseless, through the granting of National Rx's summary judgment motion and the denial of Hazra's Rule 59(e) motion to vacate.

The district court acknowledged having granted some leniency to Hazra as a pro se litigant. Ultimately, however, Hazra's repeated abuse of the judicial process resulted in

sanctions by both the district court and the court of appeals. It is with the backdrop of this flagrant abuse of judicial process that Hazra now asks this Court to overturn the district court's decision to impose sanctions. Hazra offers no legal or factual basis for arguing that the award(s) should be overturned.

Because it is unclear from Hazra's petition which award of sanctions he is requesting that this Court review -- the court of appeal's affirmance of the district court's award, the appellate court's award, or both --, National Rx will address both.

A. **Sanctions by the District Court**

Fed. R. Civ. P. 11 allows district courts, within the exercise of their own discretion, to impose sanctions for abuse of the judicial process. Rule 11 states in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other information; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11 (emphasis added). Hazra's motion to vacate pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6) was not

"well grounded in fact and [] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law...," and was therefore a violation of Rule 11. Accordingly, after denying the motion, the district court granted sanctions against Hazra, stating:

> This Court has allowed the Plaintiff to proceed in this utterly frivolous and unconscionable litigation far too long at a significant cost to the Defendants and the Courts. Plaintiff's Motion to Vacate Judgment has further unnecessarily and wastefully prolonged this litigation.

Pet. App. C. Thereafter, the United States Court of Appeals for the Sixth Circuit affirmed the imposition of sanctions, holding:

> The test for the imposition of Rule 11 sanctions is whether the individual's conduct was reasonable under the circumstances. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). With this standard in mind, our review of the record and briefs leads us to the conclusion that the district court did not abuse its discretion when it imposed sanctions. *See Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). Similarly, we conclude that this appeal is equally frivolous, and that defendant should receive its attorney fees on appeal. 28 U.S.C. § 1912; Fed. R. App. 38; *Wrenn v. Gould*, 808 F.2d 493, 504 (6th Cir. 1987).

Pet. App. A at 3.

This Court has held that, "[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).[4] In this case, the district court awarded National Rx only $2173.75 as sanctions for Hazra's frivolous Rule 60(b) motion. *See* Pet. App. C. By the time sanctions were finally awarded, Hazra should have been well aware of the frivolity of his motion since he had repeatedly made those same arguments on no less than four prior occasions[5], losing in every instance. In granting the sanctions, the district court acknowledged that the entire litigation had been "frivolous and unconscionable." Pet. App. C. The district court's small award of $2173.75 in sanctions reflected only the amount of money spent by National Rx in responding to Hazra's unsubstantiated Rule 60(b) motion. *See* Pet. App. C. The amount awarded was properly within the court's discretion, given the many thousands of dollars National Rx was forced to spend defending this "frivolous and

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[4]Where Rule 11 has been violated, sanctions are mandatory. In *Albright v. Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986), the court held that, "Rule 11 expressly mandates the imposition of sanctions once a violation is found. 'The selection of the type of sanction to be imposed lies of course within the district court's sound exercise of discretion.' *Westmoreland [v. CBS]*, 770 F.2d [1168,] 1174 [(D.C.Cir. 1985)]." *Id.* at 1222.

[5]In response to National Rx's summary judgment motion, in support of his motion to vacate pursuant to Fed. R. Civ. P. 59(e), in appealing the Order denying the motion to vacate and granting summary judgment, and in petitioning for a rehearing by the appellate court.

unconscionable" litigation. *See Patel v. Lutheran Medical Center, Inc.*, 775 F. Supp. 592 (E.D.N.Y. 1991).

The *Patel* case involved facts virtually identical to those presented here. The plaintiff in *Patel* brought an age discrimination claim. The defendant offered a valid nondiscriminatory reason for the termination of Patel's position, and when plaintiff offered no evidence in rebuttal, summary judgment was granted in defendant's favor. Patel then moved, *inter alia*, pursuant to Fed. R. Civ. P. 60(b) to have the judgment vacated. Like Hazra, Patel attached an affidavit to his motion which essentially reiterated the allegations made in the complaint and other prior pleadings. The district court denied Patel's motion and imposed sanctions pursuant to Fed. R. Civ. P. 11 on the basis that the Rule 60(b) motion lacked legal foundation. The amount of the sanctions was the defendant's expenses, including attorney's fees, in opposing Patel's motion. *Id.* at 599.

The explicit language of Fed. R. Civ. P. 11 mandated the imposition of sanctions against Hazra. The modest sum of $2173.75 imposed was well within the district court's discretion provided under the Rule and controlling case law, and was within the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10.

B. **Sanctions by the Court of Appeals**

The Order of the district court awarding sanctions against Hazra included the following footnote of stern admonition: "Plaintiff is hereby forewarned that, absent additional or new evidence, that any further pleadings or appeal in the instant matter shall be deemed frivolous and the Plaintiff will be subject to further sanctions." *See* Pet. App. C, footnote 2.

Hazra, nevertheless, blindly appealed the district court's order, despite raising no new arguments or facts. The district court's rulings were affirmed, including the imposition of Rule 11 sanctions against Hazra. In addition, the United States Court of Appeals for the Sixth Circuit imposed further sanctions upon Hazra for his frivolous appeal. These sanctions were for $2802.85, the amount of National Rx's expenses, including attorney's fees, incurred in the appeal.[6] The legal precedent for this award was cited in the Sixth Circuit's Order. Pet. App. A at 3.

The court of appeals has the power to impose sanctions for a frivolous appeal under both 28 U.S.C. § 1912 and Fed. R. App. P. 38. In *DeWitt v. Western Pacific R.R.*, 719 F.2d 1448 (9th Cir. 1983), the court cited both of the foregoing sections and held that, "An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Id.* at 1451. The foregoing statement accurately describes the petitioner's conduct in this litigation. In the *De Witt* case, the court awarded the appellee attorney's fees and double costs as a sanction for the appellant's frivolous appeal. *Id.* In so holding, the court cited the following quotation from *Simon & Flynn, Inc. v. Time Inc.*, 513 F.2d 832, 835 (2nd Cir. 1975): "'Counsel must realize that the decision to appeal should be a considered one, ...not a knee-jerk-reaction to every unfavorable ruling.'" *DeWitt*, 719 F.2d at 1451.

Attorney's fees are also a proper component of a sanctions award pursuant to Fed. R. App. P. 38. *Leahy v. Bd. of Tr. of Community College Dist. No. 508*, 912 F.2d 917 (7th

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[6] This amount was set forth in a marginal mandate dated March 3, 1993, on page 3 of the court of appeals' January 25, 1993 Order. The marginal mandate was omitted from Pet. App. A.

Cir. 1990). Furthermore, sanctions for a frivolous appeal are appropriate in discrimination cases where appeals are prosecuted despite the plaintiff's inability to come forward with facts sufficient to establish even a *prima facie* case of discrimination. *Reynolds v. Humko Products*, 756 F.2d 469 (6th Cir. 1985). Holding that sanctions were appropriate under both Fed. R. App. P. 38 and 28 U.S.C. § 1912, the United States Court of Appeals for the Sixth Circuit stated in *Reynolds*:

> The appeal in the present case clearly is frivolous. Appellant did not cite to this Court any evidence whatsoever in the record to support his claim of disparate treatment. The case should not have been appealed. Appellant needlessly complicated a meritless case in a futile effort to reverse the judgment of the district court.

Reynolds, 756 F.2d at 473-74; *see also Gianfriddo v. Western Union Tel. Co.*, 787 F.2d 6 (1st Cir. 1986). The frivolity of Hazra's appeal is even more apparent. Hazra has prosecuted two motions to vacate and two separate appeals, as well as two Petitions for Rehearing, all in an attempt to overturn an adverse summary judgment ruling, which was based upon the fact that he came forth with no evidence to show a *prima facie* case of discrimination. The imposition of sanctions by the court of appeals was within the sound discretion of that court, and no abuse of discretion has occurred. Indeed, as the cited cases establish, the action by the court of appeals in awarding sanctions against Hazra was within the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10.

The total amount of sanctions imposed by both the district court and the court of appeals is $4976.60, a fraction of the amount of money National Rx has expended in the four years defending this litigation, which the district court has acknowledged was "utterly frivolous and unconscionable" from the outset. Indeed, National Rx's costs in opposing this Petition for Certiorari, which is yet another frivolous pleading in violation of 28 U.S.C. § 1912, will exceed the total amount of sanctions at issue here. Most importantly, however, the purpose of Fed. R. Civ. P. 11 is to deter frivolous and baseless filings, and as Hazra's continued abuse of the judicial process has indicated, the amount of the sanctions imposed has not yet achieved that deterrent effect. Thus, if the amount of the sanctions is to be attacked, it is only because it was not enough.

III. PETITIONER'S REFERENCE TO THIS COURT'S HOLDING REGARDING MIXED-MOTIVE IN A DISCRIMINATION CASE IS INAPPLICABLE HERE.

Hazra has made repeated reference in his Petition to the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), implying that this decision has some bearing on his claims. The *Price Waterhouse* decision, however, does not avail the petitioner's cause. While this issue was not an issue on appeal, nor has it properly been raised as one of the questions presented in the petition for certiorari, the fact of the matter is that it has no legal relevance to this case. Even under the mixed motive theory addressed in *Price Waterhouse*, in order to defeat a motion for summary judgment Hazra would have had to come forward with some direct evidence of discrimination. Instead, Hazra admitted in his own testimony that he had no direct evidence of discrimination by National

Rx. Resp. App. 28a. Thus, the deathknell to this belated and unavailing argument is Hazra's own testimony. Hazra has repeatedly failed to produce any evidence of direct discrimination, and in the absence of this direct evidence his claims fail under *Price Waterhouse* as well. *See Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1062-63 (N.D.Ga. 1990).

CONCLUSION

The district court and the court of appeals have heard the arguments presented in Hazra's petition seven times now.[7] The inescapable conclusion which the courts considering this case have reached is that petitioner Jogananda Hazra was terminated from his job for excessive pharmaceutical dispensing errors in violation of company policy. From the outset of this litigation, the petitioner has failed to come forward with any evidence to support his claims of discrimination. Despite this lack of evidence, since the adverse summary judgment ruling Hazra has repeatedly brought motions to vacate, appeals, and petitions for rehearing in nothing more than an attempt to relentlessly relitigate his unsupported claims. Hazra's Fed. R. Civ. P. 60(b) motion was properly denied and sanctions were properly imposed against him by the district court pursuant to Fed. R. Civ. P. 11, and by the court of appeals pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38. This case fails to present any important federal question, any conflict among the

[7] The summary judgment motion, the Rule 59(e) motion to vacate, the appeal of the denial of the motion to vacate and the granting of the summary judgment motion, the petition for rehearing to the court of appeals regarding the foregoing appeal, the Rule 60(b) motion to vacate, the appeal of the denial of the Rule 60(b) motion, and the petition for rehearing to the court of appeals regarding the denial of the Rule 60(b) motion.

circuits, or any conflict with a decision of this Court. In short, there is nothing about this case which justifies review by this Court under Sup. Ct. R. 10. Accordingly, Respondent National Rx Services, Inc. respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOGANANDA HAZRA,

Plaintiff,

[Filed Sept. 5, 1990]

-V-

Case No. C2-89-551

NATIONAL Rx SERVICES, INC.,

Defendant.

OPINION AND ORDER

This matter is before the Court upon the Defendant, National Rx Services, Inc.'s, Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. In response the Plaintiff, Jogananda Hazra ("Hazra"), has filed a "Motion to Deny Defendant's Motion for Summary Judgment". The defendant has since filed with the Court a Reply and a Supplemental Reply. This case was brought through a Complaint under Title 42 U.S.C. §2000e-5(f)(1) for alleged unlawful employment practices based upon race and nationality, and discrimination bases upon age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

FACTS

The Defendant, Hazra, is originally from India and of the Asian Race. Furthermore, Hazra was born on May 30, 1935, and as such was over the age of 40 when the alleged cause of action arose. In this action, Hazra claims that National Rx unlawfully discriminated against him based upon his national origin, his race, and his age when they terminated his employment with them on October 30, 1987.

Hazra's employment began with a co-subsidiary of the defendant, National Pharmacies, Inc., in Elmwood Park, New Jersey, in April of 1983, when he was hired as a junior pharmacist. The Junior Pharmacist position was an unlicensed pharmacy position. Specifically, National Pharmacies, Inc. and Defendant National Rx Services, Inc. are subsidiaries of the same parent company. At the time of the plaintiff's hiring he was 47 years old, and thus already a member of the over 40 protected class. The plaintiff has admitted that he was not discriminated against because of his age, race or national origin at the time of his hiring in New Jersey. In February of 1984, Hazra voluntarily transferred from his position with National Pharmacies, Inc., to a job in Ohio with the defendant National Rx Services, Inc.

Defendant National Rx Services, Inc., operates a mail-service pharmacy in Columbus, Ohio. It is through this service that patient's prescriptions can be filled and provided to them through the mail. As is required by law, a licensed registered pharmacist must review, check and approve each prescription that is dispensed by the company.

After his transfer, Hazra registered as a pharmacy intern in order to become a licensed pharmacist. To become registered

the intern must work under the supervision of a registered pharmacist, or "preceptor". The registered pharmacist or preceptor must agree to supervise the intern. National Rx agreed to act in this capacity on behalf of the plaintiff. In the plaintiff's deposition at page 37, Hazra affirmatively responded to the defendant's proposition that, ". . . if the company intended to discriminate against you because of your age, it hardly would have acted as your preceptor, would it?" At some point thereafter Hazra became a registered pharmacist. On March 5, 1985, the defendant "hired" Hazra for the position of registered pharmacist. Hazra admits that there was no discrimination in the hiring of him for the position; which included a raise in pay. The position called for the plaintiff to take bottles off a conveyor belt and compare the already filled prescription with its label to determine if it had been properly filled. This job carried with it the standard responsibilities of any registered pharmacist licensed by the State of Ohio. Under Ohio law, Ohio Revised Code, Chapter 4729 and the Ohio Administrative Code, Chapter 4729-1 *et seq.*, each registered pharmacist is required to ensure that each drug that he or she dispenses to a patient is the same drug that the physician prescribed to the patient. According to the plaintiff's own deposition the registered pharmacist has the additional responsibility of ensuring that the label on the prescribed bottle correctly identifies the dispensed drug, and to this responsibility the pharmacist is held strictly accountable if the wrong drug, or the wrong strength of drug is prescribed to the patient. It was allegedly pursuant to these stringent requirements that the company adopted a disciplinary policy for staff registered pharmacists who commit dispensing errors. These policies were instituted in the Spring of 1987. According to the Defendant, corrective action is taken whenever a staff registered pharmacist dispenses a prescription that results in the patient receiving the wrong drug, the wrong strength, the

wrong dosage, or form of drug, or its equivalent generic form of the drug where the brand name drug was prescribed. National Rx contends that they review each situation independently and employ the following measures: counselling, warning, probation, and termination. The Company states as a general guideline that under this policy, a staff registered pharmacist is warned and placed on probation if he or she commits three "significant" dispensing errors within a three month period. Examples of a "significant" dispensing error would be erroneously providing the patient with the wrong strength of drug, or the wrong drug all together. The policy further provides that any further dispensing error during the probationary period can result in termination. The defendant states that the policy was communicated to all of the pharmacists over a one month period at weekly meetings and that the policy was a "guideline" for disciplinary action, and would be applied on a case-by-case basis.

On May 12, 1987, Hazra dispensed a drug which was double the strength prescribed by the physician. Hazra's supervisor's met with him and discussed with him the importance of accuracy. The defendant also alleges that they informed Hazra to slow his pace if it would aid his accuracy.[1]

On June 26, 1987, Hazra was called upon to dispense a drug known as Depakote at a 250 milligram strength. Instead, the prescription was filled with 500 milligram tablets, double the

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[1]At a later point the plaintiff contends that he was never advised to slow his pace to improve his accuracy. For purposes of the instant motion the factual discrepancy is of minimal relevance and certainly does not give rise to a genuine issue.

strength of the actual prescription. Hazra's supervisors again met with him and again cautioned him to be more careful.

A few days later, Hazra was again reprimanded for erroneously dispensing a sublingual form of a drug (to be placed under the tongue of the patient) rather than the prescribed oral form of the drug (to be swallowed). The plaintiff acknowledged that this was his third error in two months, and that he could have been discharged for making the errors, ". . .if that's what they wanted." (See Hazra deposition at p. 80). Instead, the plaintiff was placed on probation and informed that any additional mistakes in the next 60 days would result in his termination.

Less than thirty days later the plaintiff committed an additional dispensing error. Hazra acknowledged that he could have been discharged for his latest mistake, however, he was instead permitted another chance. Hazra was placed on 90-days probation, and again he was informed that any additional errors would result in his termination.

In October of 1987, Hazra committed two additional dispensing errors defined as "serious" by the defendant. In both instances the plaintiff dispensed the wrong drug. Hazra acknowledged the errors by conceding that the medication that was sent to each patient was not the medication that had been prescribed. The defendant contends that based upon these six separated errors Hazra was terminated. This contention is not refuted by the plaintiff, and in fact the plaintiff recognizes his errors and does not dispute that these errors were the stated basis for his termination. Instead, the plaintiff bases his claim upon a statistical argument. The argument essentially follows the logic that he may have in fact committed the above-referenced errors, however, based upon the total number

of prescriptions filled by him his error rate[2] was below that of the company's average for all pharmacists. The plaintiff obtained the Defendant National Rx's error rate from an article printed in the October 1987 issue of *U.S. Pharmacist* entitled "What Do Mail-Order Rxs Really Mean for Pharmacy?". Based upon the plaintiff's statistics he concludes that the defendant's must have discriminated against him based on either his age, race, nationality, or a combination of these factors because his error rate was below that of the company's average.[3]

STANDARD OF REVIEW

In considering this motion, the Court is mindful that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50(a)], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) citing *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). Thus, the Supreme Court concluded in *Anderson* that a judge considering

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[2]Presumably, the error rate is the number of errors per one hundred prescriptions filled.

[3]This is due to his own calculation that his six errors amounted to an error rate of 0.0097, while either Medco Pharmacy or National Rx has held themselves out in the aforementioned article as having an error rate of 0.012. His argument is that since his error rate is below that of the company as a whole (the plaintiff presumes the 0.012 representation is a mean error rate of all pharmacists), the stated reason for his termination, excessive errors, must be pretextual. However, the plaintiff has also admitted that he does not know whether the quoted "error rate" included both nonserious and serious errors, or whether the rate was a mean or a median, or even the exact dates over which the information for the rate was calculated.

a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." 477 U.S. at 252.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In essence, the inquiry is whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 252.

Such an inquiry necessarily implicates the evidentiary standard of proof that would apply at the trial on the merits. As a result, the Court must view the evidence presented through the prism of the substantive evidentiary burden. Rule 56(e) therefore requires that the nonmoving party go beyond the pleadings and by their own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on

which that party will bear the burden of proof at trial. *Id.* at 322.

In *Banks v. Rockwell International N. Am. Aircraft Operations*, 666 F.Supp. 1053 (S.D. Ohio 1987) (J. Graham), this district enunciated the importance of granting summary judgments in appropriate situations by stating that: "Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed to secure the just, speedy and inexpensive determination of every action." *citing, Celotex Corp. v. Catrett*, 477 U.S. at 324, (quoting Fed. R. Civ. P. l) *Anderson*, 477 U.S. at 252.

Thus, the mere existence of a scintilla of evidence in support of a plaintiff's claim is insufficient--there must be evidence upon which a jury could reasonably find for the plaintiff. Having discussed the Rule 56 standard of review, the Court now turns to the merits.

ANALYSIS

The clearly enunciated rule in this circuit is that age discrimination cases are to be decided on a "case by case basis", utilizing the slightly modified version of the criteria set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Wanger v. G.A. Gray Company*, 872 F.2d 142 (6th Cir. 1989). However, a mechanistic application of *McDonnell Douglas* has been explicitly discouraged. *Merkel v. Scovill, Inc.*, 787 F.2d 174, 177 (6th Cir.) (quoting *Sahadi v. Reynolds Chem.*, 636 F.2d 1116, 1118 n.3 (6th Cir. 1980)(per curiam)), *cert. denied*, 479 U.S. 990 (1986); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982).

The basic allocation of burdens and order of presentation of proof was first set forth by *McDonnell Douglas*, and later expounded upon by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1980), which provided as follows:

> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination. *Id.* at 804.

Therefore, the Court must first determine if the plaintiff has met the burden of establishing a prima facie case of discrimination.

In an age discrimination case, a discharged employee is called upon to present a prima facie case "by introducing evidence that he was adversely affected by the defendant's employment decisions 'under circumstances which give rise to

an inference of unlawful discrimination.'" *Ridenour v. Lawson Co.*, 791 F.2d 52, 55 (6th Cir. 1986) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *see also Wanger v. G.A. Gray Co.*, 872 F.2d 142 (6th Cir. 1989).

The Court was mindful to note in each decision that the burden of establishing a prima facie case of discrimination is not onerous. *Id.*, at 253. In *McDonnell Douglas*, the Court provided that the initial burden of showing a prima facie case of discrimination is done by demonstrating, by a preponderance of the evidence, the following:

> (i) that the plaintiff is a member of a protected class;
>
> (ii) that the plaintiff is qualified for the position and performed as required in the position;
>
> (iii) that despite the plaintiff's qualifications and performance, he was terminated; and
>
> (iv) that the defendant placed a person outside the protected class in the position or that other reasonable evidence exists for inferring that he was disparately treated.

See generally Wilkens v. Eaton Corp., 790 F.2d 515, 520 (6th Cir. 1986) (quoting Ackerman, 670 F.2d at 69); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180-81 (6th Cir. 1983); *Owens v. Freeman United Coal Mining*, 649 F. Supp. 1565, 1568 (S.D. Ill. 1986).

The Court finds that the plaintiff has failed to meet its initial burden of establishing a prima facie case of discrimination. In

reviewing the four part test, it is not refuted that the plaintiff is a member of a protected class, however, there are serious questions as to whether the plaintiff's performance was what was expected of him in light of his numerous errors. The plaintiff admits the errors were made and to some extent admits that some of the errors were quite serious. His case instead attempts to focus not on his mistakes, but rather on the supposed rate of error for the entire company. However, the plaintiff has not offered this Court any evidence to place the quoted error rate found in the magazine article into context for use in this matter. Instead, the plaintiff wishes this Court to make a wholesale acceptance of the number quoted as being reliable, relevant, error-free, properly quoted, and in context, then use that number to draw a very serious inference of race, nationality or age discrimination.[4] This is merely

---

[4]In order for the rate of errors of National Rx, as quoted in the magazine article to become relevant in the instant case it would be necessary for the rate of error to be calculated based upon data accumulated after the policy had been in effect. Only then could the rate be relevantly compared to the rate of error of the plaintiff. Furthermore, the calculations performed by the plaintiff would have to be calculated in the same manner as the figure which was quoted in the magazine article. Also, the plaintiff's calculations and the information used to make the calculations would have to be proven to be correct. These, along with a myriad of other factors would need to be evidenced before the numbers the plaintiff relies upon would become relevant. However, assuming, *arguendo*, the figures used by the plaintiff in his argument were correct, relevant, etc., and the defendant's logic is followed,--that logic being that since the rate of errors was higher for the company as a whole than was his personal rate of errors, then the company must have terminated him based upon discrimination-- at the very least the plaintiff should be able to point to at least one example where an individual that had a worse error rate had not been terminated, presumably because he or she was under forty or american. Instead, the plaintiff is unable to show a single deviation from the set standard of the instituted policy.

hypothecation and speculation that this Court will not enter into.

Based upon the pleadings, exhibits and depositions placed before the Court in this matter it becomes readily apparent that the defendant, National Rx, instituted a very strict policy in an attempt to rectify the problem or at least lower the error rate of prescriptions being filled. The policies appeared to be properly instituted. The Court has been provided no evidence upon which it could conclude that the defendant applied the policies disparately, therefore it must conclude that the policies were applied to all equally. By facts unrefuted by the plaintiff, he made three errors and was placed on probation pursuant to the policies. While under the probation an additional error was made, however, instead of being terminated the plaintiff was again warned and given an opportunity to correct the situation. Nonetheless, additional errors were made and the defendant was terminated. The plaintiff has admitted that he could not name another person who had more errors that had not been terminated, and he further admitted that the errors were the reason for his termination (See the deposition of Hazra at p. 105). Therefore, there appears to have been equal application of the policies as to all employees at National Rx.

Based upon the aforementioned reasons the Court finds that there is no question of material fact, and that the plaintiff has failed to make even a prima facie showing of discrimination, which is needed to prevail as matter of law. Furthermore, the Court finds that the plaintiff has failed to introduce evidence that he was adversely affected by the defendant's employment decision to terminate him, under circumstances which give rise to an inference of unlawful discrimination. Therefore, the

defendant's motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOGANANDA HAZRA,

Plaintiff, [Filed February 12, 1991]

-V- Case No. C2-89-551

NATIONAL Rx SERVICES, INC.,

Defendant.

OPINION AND ORDER

This matter is before the Court upon the Plaintiff, Jogananda Hazra's, Motion to Alter or Amend a Judgment pursuant to Federal Rule of Civil Procedure 59(e) filed September 14, 1990. The plaintiff moves the Court to vacate the Order of September 5, 1990, which granted the Defendant, National Rx Services, Inc.'s, Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and to alter and issue a new order denying Defendant's Motion for Summary Judgment. In response to plaintiff's motion, defendant has filed a Memorandum Contra Plaintiff's Motion To Vacate Judgment. This case was originally brought through a complaint under Title 42 U.S.C. §2000e-5(f)(1) for alleged unlawful employment practices based upon race and nationality, and discrimination based upon age in violation of 29 U.S.C. §621 *et seq.*

FACTS

The Plaintiff, Jogananda Hazra (Hazra), is originally from India and is of the Asian race. Hazra was born on May 30, 1935 and was, therefore, over the age of forty and within the protected class set forth in 29 U.S.C. §631, when the following events, leading toHP LaserJet IIPHPLASIIP.PRSorigin when they terminated his employment with them on October 30, 1987.

Hazra began employment with a co-subsidiary of the defendant, National Pharmacies, Inc., in Elmwood Park, New Jersey, in April of 1983. The plaintiff was hired as a Junior Pharmacist which is an unlicensed pharmacy position. The plaintiff has admitted that he was not the victim of discrimination based upon his age, race or national origin at the time of his hiring in New Jersey. (Plaintiff's deposition page 29). In February of 1984, Hazra voluntarily transferred to a job in Ohio with the defendant, National Rx. The plaintiff has admitted that there was no discrimination involved in his transfer to Ohio. (Plaintiff's deposition page 32).

Defendant, National Rx, operates a mail service pharmacy in Columbus, Ohio. It is through this service that patient's prescriptions can be filled and provided to them through the mail. The law requires that each prescription that is dispensed by the company must be reviewed, checked and approved by a licensed pharmacist.

After his transfer to National Rx, Hazra registered as a pharmacy intern in order to become a licensed pharmacist. In order to become registered, the intern must work under the supervision of a registered pharmacist referred to as a "preceptor". National Rx agreed to act in this capacity on behalf of the plaintiff. Hazra has admitted that the defendant's voluntary acceptance of the role of preceptor is inconsistent

with the intention to discriminate. (Plaintiff's deposition page 37).

After Hazra became registered, the defendant "hired" him as a Registered Pharmacist. Again, Hazra admits that there was no discrimination in his hiring for that position, which included a pay raise. (Plaintiff's deposition page 37). Plaintiff's duties entailed taking bottles from a conveyer belt and comparing the previously filled prescription with the bottle's label to determine if it had been properly filled. This position carried with it the standard responsibilities of a registered pharmacist licensed by the State of Ohio. Under Ohio Revised Code, Chapter §4729 and the Ohio Administrative Code, Chapter §4729-1, et seq, each registered pharmacist is required to ensure that each drug that he or she dispenses to a patient is the same drug that the physician prescribed to the patient. Furthermore, as the plaintiff has admitted, it is the additional responsibility of the pharmacist to ensure that the label on the prescribed bottle correctly identifies the dispensed drug and to this responsibility the pharmacist is held strictly accountable if the wrong drug, or the wrong strength of drug is prescribed to the patient. (Plaintiff's deposition p.40).

Apparently due to concerns of quality assurance, National Rx adopted a disciplinary policy for staff registered pharmacists who commit dispensing errors. This policy was instituted in the Spring of 1987. According to the defendant, corrective action is taken whenever a staff registered pharmacist dispenses a prescription that results in the patient receiving the wrong drug, the wrong strength, the wrong dosage, or form of drug, or the equivalent generic form of the drug where the brand name drug was prescribed. National Rx contends that they review each situation independently and employ measures such as counselling, warning, probation, and termination. The company states, as a general guideline, that under the policy, a staff registered pharmacist is warned and placed on probation

if he or she commits three "significant" dispensing errors within a three month period. A "significant" or serious dispensing error would entail providing the wrong strength or wrong drug to the patient. The policy further provides that any further dispensing error during the probationary period can result in termination. The defendant states that the policy was communicated to all of the pharmacists over a one month period at weekly meetings and that the policy was a "guideline" for disciplinary action and would be applied on a case-by-case basis. (Affidavit of John R. Siddle).

On May 12, 1987, Hazra was counseled by his superiors concerning a dispensing error in which Hazra dispensed a drug which was double the strength prescribed by the physician. Hazra's supervisors discussed the importance of accuracy with him at this meeting.[1]

On June 26, 1987, Hazra was again counseled by his superiors for a dispensing error. Hazra again dispensed a drug which was double the strength prescribed by the physician and was again cautioned to be more careful in his quality performance.

A few days later, on June 30, 1987, Hazra was again counseled by his supervisors for a dispensing error. Hazra erroneously dispensed a sublingual form of a drug (to be placed under the tongue of the patient) rather than the prescribed oral form of the drug (to be swallowed by the patient). The plaintiff has acknowledged that this was his third dispensing error in two months, and that he could have been discharged for making the errors, ". . .if that's what they wanted." (Plaintiff's deposition p. 80). Instead of discharge, Hazra was placed on probation and informed that any

---

[1] Although not specifically stated, the need to properly fill prescriptions is apparent to this Court. Individuals rely upon their doctors and pharmacists without any independent means to discover latent errors.

additional mistakes in the next 60 days would result in termination.

Less than 30 days later, on July 27, 1987, Hazra was yet again counseled concerning a dispensing error. Hazra acknowledged that he could have been discharged for his latest mistake. (Plaintiff's deposition p. 81). Instead of terminating his employment the defendant placed Hazra on a 90 day probation, and again informed him that any additional errors would result in his termination.

In October of 1987, Hazra committed two additional dispensing errors defined as "serious" by the defendant. In both instances the plaintiff dispensed the wrong drug. Hazra was terminated on October 30, 1987. The defendant claims that Hazra's discharge was based upon these six separate dispensing errors. The plaintiff does not refute the defendant's contention. Hazra has acknowledged his errors and does not dispute that these errors were the stated basis for his termination. Instead, the plaintiff based his claim on a statistical argument. Plaintiff's argument was essentially that although he committed the errors mentioned above, his error rate (number of errors in relation to the total number of prescriptions filled) was below the average error rate for all of the company's pharmacists. The plaintiff obtained the company's error rate from an article printed in the October 1987 issue of U.S. Pharmacist entitled "What Do Mail-Order Rxs Really Mean for Pharmacy?". Based upon the plaintiff's statistics he concluded that the defendant must have discriminated against him based on either his age, race, nationality, or a combination of these factors because his error rate was below that of the company's average.

This Court granted Defendant's Motion for Summary Judgment in its Order of September 5, 1990. This Court found that there was no question of material fact, and that the plaintiff had failed to make even a prima facie showing of

discrimination, which is needed to prevail as a matter of law. The Court further found that the plaintiff has failed to "introduce evidence that he was adversely affected by the defendant's employment decision to terminate him, 'under circumstances which give rise to an inference of unlawful discrimination.'" Ridenour v. Lawson Co., 791 F.2d 52, 55 (6th Cir. 1986) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). The Court found that the plaintiff had not meet the initial burden of establishing a prima facie case of discrimination as set forth in McDonnell Douglas, Corp. v. Green, 411 U.S. 792 (1973). Specifically, the plaintiff failed to prove that he had performed as required in the position in light of the six dispensing errors. The Court could not accept the plaintiff's statistical argument as he had failed to present any evidence allowing the error rate to be applied in this context. The Court could not accept the bald assertion of the differing error rates, as calculated by the plaintiff, as the basis for an inference of discrimination without any proof of their being reliable, relevant, error-free, properly quoted, or in context. Furthermore, plaintiff failed to show one instance where an individual with a worse error rate was not fired.

The plaintiff now moves to vacate the Order of September 5, 1990 which granted Defendant's Motion for Summary Judgment. The plaintiff claims that there has been an error of law in granting the motion and that counsel for the defendant has perpetrated fraud upon the Court. The plaintiff claims that defendant's denial of a specific question in the plaintiff's interrogatories concerning an alleged conversation in 1985 between the plaintiff and one of his supervisor's, Steve Harris, constitutes fraud upon the Court. Furthermore, the plaintiff asserts, again based upon the defendant's denial, that there is a disputed fact and therefore, the granting of the motion for summary judgment was an error of law. The plaintiff also

claims that he meet the initial burden of establishing a prima facie case. Plaintiff further asserts that he would have no problem in proving disparate treatment. For these reasons, the plaintiff moves the Court to vacate its order granting summary judgment.

STANDARD OF REVIEW

Plaintiff's motion to vacate, alter and to issue a new order is properly considered a Motion to Alter or Amend a Judgment pursuant to Federal Rule of Civil Procedure 59(e). Fed. R. Civ. P. 59(e); Smith v. Hudson, 600 F.2d 60 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); see Foman v. Davis, 371 U.S. 178, 181 (1962); Huff v. Metropolitan Life Insurance Co., 675 F.2d 119 (6th cir. 1982); Kennedy v. City of Cleveland, 797 F.2d 297, 304 (6th Cir. 1986). The grant or denial of a Rule 59(e) motion is within the informed discretion of the district court and is reversible only upon the showing of abuse. United States Labor Party v. Oremus, 619 F.2d 683, 692 (7th Cir. 1980); also see Hopkins v. Coen, 431 F.2d 1055, 1059 (6th Cir. 1970); Milwee v. Peachtree Cypress Investment Co., 510 F.Supp. 284, 289-90 (E.D. Tenn. 1978).

ANALYSIS

Plaintiff's motion to vacate is based primarily upon a single factual claim that a conversation allegedly occurred in 1985 between the plaintiff and one of his supervisor's, Steve Harris. Plaintiff claims that at that time Mr. Harris told the plaintiff to increase his speed. The defendant has denied the occurrence in its answer to plaintiff's interrogatories. The plaintiff claims that defendant's denial of the occurrence is a basis for overturning the Order for Summary Judgment. Plaintiff claims that defendant's denial constitutes fraud upon the court, which

is a basis for vacating the judgment. Plaintiff also claims that defendant's denial shows that the issue is in dispute and, therefore, there is an error of law in the granting of a summary judgment motion. Plaintiff also alleges that he can prove disparate treatment and that he has, in fact, satisfied the prima facie burden of McDonnell Douglas. The court will now examine these claims seriatim.

While it is undoubtedly true that the occurrence of the alleged discussion is in dispute in so much as defendant denies it occurred, it is also true that the fact is irrelevant and immaterial to the case at bar. The alleged discussion took place two years before the events leading to the plaintiff's employment termination. Furthermore, even if the conversation occurred, a new policy had been implemented and there is evidence that plaintiff's supervisors counseled him to slow down if necessary.

In addition to the factual immateriality, the occurrence or non-occurrence of the conversation is legally immaterial. Even if plaintiff was subject to the alleged pressure to "speed up", plaintiff has admitted that there was no disparate treatment in the application of the pressure. Plaintiff admitted that "all of the pharmacists were under the same pressures in terms of speed". (Plaintiff's deposition p. 171). No inference of unlawful discrimination can be gained from this disputed fact.

The dispute over the occurrence of the conversation is also immaterial, as are all other disputed issues in the case, as plaintiff failed to prove an essential element necessary for him to prevail. Plaintiff failed to meet the prima facie requirement set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Specifically, plaintiff failed to prove that he was qualified for the position. Since the plaintiff completely failed to prove an essential element of his case, all other facts are immaterial. see Celotex Corp. v. Catrett, 477 U.S. 317, 323. This failure to meet the prima facie burden makes the factual

dispute immaterial as "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment...[f]actual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248. Plaintiff's alleged disputed issue is not a "material fact" and as such, there remains no genuine issue of material fact. Therefore, summary judgment was properly granted and there is no error of law.

Plaintiff's allegation that defendant's denial of the occurrence in its answer to plaintiff's interrogatories constitutes fraud upon the court is without merit. A mere dispute of an immaterial issue does not constitute fraud. Furthermore, the plaintiff has the burden to demonstrate, by clear and convincing evidence, fraud upon the court. Plaintiff has failed to meet this burden. In any respect, such a decision is well within the informed discretion of the court and there are no grounds for overturning a court order. see generally Wright and Miller Federal Practice and Procedure §2860 p. 254, 256.

The plaintiff also baldly asserts that he would have no problem showing disparate treatment. The plaintiff in "opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but. . .must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253. There is nothing in the pleadings, affidavits or memorandum to demonstrate disparate treatment and plaintiff offers no new facts. The time for bald assertions has passed, there is nothing in the record, nor does the plaintiff now provide any new information, that leads to even an inference of unlawful discrimination.

Finally, plaintiff asserts that he did indeed meet the prima facie burden set forth in McDonnell Douglas. The plaintiff

claims that he must be qualified for the position as he was hired for the position. However, as plaintiff admits, he became "unqualified" for the position on the basis of six separate dispensing errors. The question is not whether he was originally qualified for the position but whether he was "performing his job at a level that met his employer's legitimate expectations." *Loeb v Textron, Inc.* 600 F.2d 1014 (1st Cir. 1979). In light of the six dispensing errors it can hardly be said that he "was doing his job well enough to rule out the possibility that he was fired for inadequate job performance" *Loeb*. Plaintiff has failed to demonstrate that he was performing his job as expected and, therefore, has failed to meet the prima facie requirement.

CONCLUSION

Plaintiff's claims of Error of Law and Fraud upon the Court are without merit. The alleged factual dispute cited by the plaintiff in support of his claims is irrelevant and immaterial. The plaintiff has not shown disparate treatment and has failed to meet the prima facie burden for a discrimination case. There is no genuine issue of material fact and summary judgment was properly granted. Therefore, plaintiff's motion to vacate is hereby DENIED.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

No. 91-3201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOGANANDA HAZRA,	)	[Filed July 22, 1991]
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	ORDER
	)	
	)	NOT RECOMMENDED
NATIONAL RX	)	FOR FULL TEXT
SERVICES, INC.,	)	PUBLICATION
	)	
Defendant-Appellee.	)	

BEFORE: MERRITT, Chief Judge; KEITH, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

Jogananda Hazra, an Ohio citizen, appeals pro se from the summary judgment for defendant and the order denying his motion to alter or amend the judgment in this action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 621. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Mr. Hazra sought reinstatement, back pay, and punitive damages in this suit, alleging that he had been discharged from his position as a pharmacist on October 30, 1987, on the basis of his age, race, and national origin. The defendant moved for summary judgment, based on evidence that the discharge was due to frequent errors in checking prescriptions in violation of an established policy. The district court granted defendant's motion, and subsequently denied Hazra's Fed. R. Civ. P. 59 motion to alter or amend.

Upon consideration, it is concluded that defendant was entitled to summary judgment, as Hazra failed to establish essential elements of his case on which he has the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Hazra did not establish a prima facie case of discrimination, because he did not show that he was qualified for his position. *See Wilkins v. Eaton Corp.*, 790 F.2d 515, 520-21 (6th Cir. 1986). Moreover, he did not establish that the legitimate reason given by defendant for his discharge was pretextual, either by direct evidence of discrimination, or circumstances from which discrimination could be inferred. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987). Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

No. 91-3201

ISSUED AS MANDATE: December 5, 1991
COSTS: (Awarded to appellee)

FEES:	$None
PRINTING:	$1,380.25
TOTAL:	$1,380.25

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - - - -

Jogananda Hazra, :

Plaintiff, :

vs. : Case No. C2-89-551

National Rx Services, Inc.,

Defendant. :

- - - - -

Deposition of JOGANANDA HAZRA, the Plaintiff herein, called by the Defendant for cross-examination under the Applicable Rules of Federal Civil Procedure, taken before me, Kathryn E. Smith, a Court Reporter and a Notary Public in and for the State of Ohio, pursuant to notice and stipulations of counsel, at the offices of Emens, Hurd, Kegler &

Ritter, 65 East State Street, Columbus, Ohio, on Monday, September 11, 1989, at 9:40 o'clock a.m.

- - - - -

RUNFOLA & ASSOCIATES (614) 445-8477
COMPUTERIZED TRANSCRIPTION

Q. If any statements of disparaging or discriminating nature would have been made, you would have been sensitive to that, wouldn't you?

A. Sure.

Q. And you don't recall any?

A. No.

Q. So you have no direct evidence that your termination was affected by your age?

A. Direct evidence, no. Except as I said, when I compared the facts.

Q. Same with your national origin?

A. Yeah.

Q. Now looking at the sole basis for your claim, that is that your error rate was less than the mean error rate?

A. Yeah.

A. Besides that measured point is, should not have because I should not have been subjected to that kind of conditioning with threat. I don't know how many people they did this. This is wrong.

Q. I'm sorry.

A. When I was called in and I was asked to give in writing that 30 days I should improve my productivity rate or I should be terminated.

/s/ Jogananda Hazra

JOGANANDA HAZRA

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 16th day of October, 1989.

/s/ Thomas F. Runfola
Notary Public in and for
the State of Ohio

My Commission expires: March 23, 1993

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1 CERTIFICATE

2 STATE OF OHIO :

3 COUNTY OF FRANKLIN : SS.

4 I, Kathryn E. Smith, a Notary Public in and for

5 the State of Ohio duly commissioned and qualified,

6 do hereby certify that JOGANANDA HAZRA was by me

7 first duly sworn to testify to the truth, the whole

8 truth, and nothing but the truth in the cause

9 aforesaid; that the testimony then given by him was

10 by me reduced to stenotypy in the presence of said

11 witness, afterwards transcribed by means of computer;

12 that the foregoing is a true and correct transcript

of the testimony so given by him as aforesaid; and that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney of either party herein, or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 19th day of September , 1989.

/s/ Kathryn E. Smith
KATHRYN E. SMITH, Notary Public - State of Ohio.

My Commission expires January 14, 1993.

RUNFOLA & ASSOCIATES (614) 445-8477
COMPUTERIZED TRANSCRIPTION

Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

(3)

NO. 93-27

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOGANANDA HAZRA - PETITIONER

vs.

NATIONAL RX SERVICES, INC. - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JOGANANDA HAZRA
PETITIONER, PRO SE
827 SOUTH JAMES ROAD
APARTMENT 7
COLUMBUS, OHIO 43227
PHONE: (614) 237-7336

9 pp

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REPLY TO BRIEF IN OPPOSITION

Petitioner in response to respondent's brief in opposition states that respondent's counsel to mislead this Court in an utter desperation made meritless, frivolous, statements. Proof, presented as follows:

1. Respondent's counsel stated:
   "On June 29, 1993, petitioner filed in this Court his Petition for a Writ of Certiorari. The Petition is untimely pursuant to Sup. Ct. R. 13.1." (See Resp. Br. p. 3).

This is frivolous because docket entry shows Petition's filing date as May 18, 1993.

2. Respondent's counsel stated:
   "Here the district court and the court of appeals have repeatedly held on the undisputed facts that petitioner's claims of discrimination fail as a matter of law." (See Resp. Br. p. 12).

This again is frivolous because as shown in Petition for Writ of Certiorari, Statement of the Case pp. 10-11, paragraphs 7 & 8, that respondent's counsel and its Labor and Associate Counsel perpetrated fraud. And Smith realizing that although counsel perpetrated fraud but did not succeed in defrauding petitioner, then Smith in concert with Smith's associate attempted to deceive petitioner by and through counsel and Smith also in concert with Smith's associate misrepresented facts in magistrate's Orders, then Smith realizing that all of them failed in deceiving and defrauding petitioner, then Smith allowed counsel to file motion for summary judgment and granted respondent's motion for summary judgment, then Smith realizing from petitioner's Rule 59(e) motion that Smith and respondent's counsel failed in deceiving and defrauding petitioner then Smith perpetrated fraud about facts in Smith's Opinion and Order of February 12, 1991

(See Pet. pp. 15-16), and Smith considered diametrically opposite factors as one and the same (See Pet. pp. 16-18), and Smith under pretext of opinion violated rules of law to aid and abate respondent's counsel and respondent (See Pet. pp. 20-21), then Smith realizing from petitioner's Rule 60(b) motion that Smith got caught that Smith perpetrated fraud about facts in Smith's Opinion and Order of February 12, 1991, so, Smith abused discretion and to cover-up Smith's abuse of discretion misrepresented fact and denied petitioner's Rule 60(b) motion and imposed sanction (See Pet. pp. 15-16). This Court should note that Smith also considered irrelevant and immaterial matters to aid respondent's counsel and respondent because counsel quoting Smith stated:

> "Hazra was 47 years old when he was hired as a junior pharmacist by National Pharmacies, Inc., a co-subsidiary of National Rx, in April, 1983. Resp. App. 2a. Hazra has admitted that he was not discriminated against because of his age, race or national origin at the time of his hiring in 1983. Resp. App. 2a." (See Resp. Br. p. 6).

This is irrelevant and immaterial because as stated in Petition (See Pet. p. 4, lines 16-17), when petitioner was hired in 1983 by National Pharmacy, Elmwood Park, New Jersey, at that time National Pharmacy was under the umbrella of a separate corporation, i.e., people with different style and attitude. And not only respondent's counsel are up to their eyeballs in fraud, dirty tricks, and deception, but also counsel's law firm is involved because counsel's law firm handled all paper works. Note this was indicated to the appeals' court (See Pro Se Appellant's Brief filed August 28, 1992, pp. 5-6, answer to question 2). It should be noted that respondent's counsel nonsensically muttered and blabbed meritlessly all over Respondent's Brief. Proof, see counsel stated:

> "Hazra's motion, brief and affidavit contained nothing more than rambling unsupported alle-

gations of fraud against everyone who had argued or decided a motion unfavorably toward him." (See Resp. Br. pp. 14-15).

In this context this Court should note that the relevance of all those court cases cited by respondent's counsel to the facts of the instant case is questionable because that Mastini case cited at p. 18 & 20 of Respondent's Brief was cited by the appeals' court in support of its decision and petitioner analyzed and shown that the case has no bearing to the facts of the instant case (See Pet. p. 22).

3. Respondent's counsel stated:
"The Price Waterhouse decision, however, does not avail the petitioner's cause. While this issue was not an issue on appeal," (See Resp. Br. p. 28).

This, likewise, is frivolous because petitioner discussed "mixed motive" in appeals' court [See Pro Se Appellant's Brief filed August 28, 1992, pp. 9-10, answer to question 3; also see Brief in Support of the Motion to Vacate Judgment pp. 6-8 and Affidavit pp. 14-18, paragraphs 12 and 13, filed on January 31, 1992, with the motion under Rule 60(b)], note also it has been informed to this Court (See Pet. p. 20). In this context it should be noted that although respondent's counsel and its Labor and Associate Counsel perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests", but petitioner has evidence of disparate treatment with respect to conditioning, i.e., experimenting, with threat of termination to increase petitioner's production rate (See Pet. pp. 9-10, paragraph 6); that is, respondent has introduced bias into the experimental procedure. Therefore, on first impression though it may appear that respondent has to produce direct proof because respondent has to produce data but in reality it is not. Specially, because of the condition, that is, front end bias in conditioning, that is, experimenting on, petitioner with threat of termination to increase petitioner's production rate and again back end experimentation

on petitioner under pretext of giving an opportunity to correct by deliberately and maliciously shifting and setting the condition to 90 days, knowing that petitioner failed to catch an error within 30 days of the first Notice of Disciplinary Action. So, respondent has to first produce data to nullify the data which petitioner produced because the data that petitioner produced is the results of respondent's experimentation on petitioner. And this Court should note that respondent has to bring data to nullify the data that petitioner produced because respondent by illegitimate means created a situation to legitimize illegitimate acts. And after respondent nullify the data then would come the question of opportunity for respondent to consider to terminate petitioner. This Court should note that it is consistent with the guideline set forth by this Court referring to its previous rulings involving "mixed-motives" in Price Waterhouse [See Price Waterhouse v. Hopkins, 490 U.S. 228, 248-250, 109 S. Ct. 1775, 1789-1790 (1989)].

4. Respondent's counsel stated:
"Hazra admitted in his own testimony that he had no direct evidence of discrimination by National Rx. Resp. App. 28a. Thus, the deathknell to this belated and unavailing argument is Hazra's own testimony." (See Resp. Br. pp. 28-29).

This again is meritless because it is irrelevant and immaterial although the statement is true in part. Because petitioner was deposed at a time when petitioner's interrogatories were pending with respondent's counsel. That is, petitioner was deposed at a time when petitioner was trying to discover. In this context note what this Court stated about discovery process in footnote 12 in Price Waterhouse (See Pet. p. 18). And after deposing petitioner respondent's counsel in response to petitioner's interrogatories perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests". That respondent's counsel involved in perpetrating fraud in "Defendant's Response to Plaintiff's Interrogatories and Docu-

ment Production Requests" because of the following facts: (a) nobody but respondent's counsel knew what was in petitioner's interrogatories because it was sent to respondent's counsel; (b) counsel held on to petitioner's interrogatories and when deposed petitioner, deposed petitioner from petitioner's own questions and learned from petitioner what respondent did and attempted to do by and through which agents and, respondent's counsel also had with counsel respondent's Labor and Associate Counsel; (c) it was respondent's counsel who mailed to petitioner the above titled paper; (d) counsel in response to petitioner's "Motion to Compel Answer to Interrogatories by Plaintiff " did not make any change in answer, just submitted a verification page with respondent's Labor and Associate Counsel's name. It should be noted that the foregoing are just facts. Then, there are laws which would put respondent's counsel in the center of it all. Laws like F.R.C.P. Rule 11 and this Court's ruling about ABA Canon in Nix, Warden v. Whiteside, 475 U.S. 157, 166-171, 106 S.Ct. 988, 994-996 (1985). Finally, respondent's counsel could have made counsel's claim of innocence believable if respondent's affiant-deponent, Jack Siddle, in his affidavit would have stated that petitioner was not experimented on with threat of termination to increase petitioner's prescription checking rate or on the date of termination they did not attempt to blackmail petitioner. Note respondent's affiant-deponent, Jack Siddle, has not said anything of that sort to vindicate counsel (See Affidavit submitted in support of Defendant's Motion for Summary Judgment). Furthermore under law, since all of them conspired to violate petitioner's U.S. Constitutional Rights to equal protection and equal privileges under the law because of petitioner's race and national origin (See Pet. pp. 24-25) and, since this is continuous from the time petitioner filed the lawsuit in the district court and, since this Court in Scott quoting Griffin ruled that in order to be actionable under 42 U.S.C. Section1985(3) a conspiracy, "must aim at a deprivation of the equal enjoyments of rights secured by the law to all." [See United Brotherhood of Carpenters & Joiners of America v. Scott, 436 U.S. 825, 835, 103 S.Ct. 3352, 3359 (1983)]. And Scott specifically recognized that such rights can arise from state law (Id., at 833, 3359). Therefore, under state law petitioner

would bring them all (i.e., respondent, its affiant-deponent, its Labor and Associate Counsel, its counsel and their law firm) for conspiracy to violate petitioner's state's civil rights laws and conspiracy to violate petitioner's state's tort laws. And under state's tort laws petitioner would bring them all for deliberately and maliciously experimenting on Petitioner to defame and ultimately for defamation; intentional infliction of mental and emotional distress; fraud and dirty tricks.

In summary, for the foregoing reasons and reasons set forth in Petition, as requested in Petition (See Pet. pp. 26-27) this Court should vacate and reverse the appeals' court decision of 1993 because justice demands reversal. And this Court should include in its direction to the appeals' court all those that have been requested in the Petition including double the amount on costs related to the lawsuit. This Court should award double costs because counsel in concert with respondent's Labor and Associate Counsel: (a) perpetrated fraud in "Defendant's Response to Plaintiff's Interrogatories and Document Production Requests"; (b) destroyed discoverable evidence; (c) perpetrated dirty tricks in "Stipulation"; (d) filed summary judgment motion; (e) now filed F.R.C.P. Rule 11 motion and F.R.A.P. Rule 38 motion.

CONCLUSION

Petition for a writ of certiorari should be granted as requested in the Petition.

Respectfully submitted,

Jogananda Hazra

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Petitioner, pro se